Supreme Court, U.S.
FILED

03 289 JUL 31 2003

No. _____

In the
Supreme Court of the United States

TRUDY AND JIMMIE BELGARD AND
BELWISE AQUACULTURE SYSTEMS INC.
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE;
ANN VENEMAN, SECRETARY, DEPARTMENT OF
AGRICULTURE; FARM SERVICES AGENCY; WILLY COOPER
Executive Director for Farm Service Agency for Louisiana;
CRAIG MCCAIN, COUNTY EXECUTIVE DIRECTOR; ROBERT
BRADLEY, FARM SERVICE AGENCY PROGRAM SPECIALIST,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL A. LEMKE III
Counsel of Record
PO BOX 595
HARRISONBURG, LA 71340
(318) 744-5431

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

93 pp

QUESTION PRESENTED FOR REVIEW

Whether the District Court was proper in granting the governments motion for summary judgment finding no material issue of fact in dispute and that the government was entitled to judgment in their favor as a matter of law, affirmed by the U.S. Court of Appeal, in regards to these now consolidated cases for judicial review of an agency action.

ARTIES

Petitioners

Trudy Belgard
Jimmie Belgard
Belwise Aquaculture Systems, Inc.

Respondents

United States Department of Agriculture
Ann Veneman
Willy Cooper
Craig Mccain
Robert Bradley
Mr. Robert Thrall, Esq., Counsel for Appellee

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PRIOR OPINIONS 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

Procedural History 2

Facts 4

- Introduction 4

REASONS FOR GRANTING THE PETITION 6

- Relief Sought 6

CONCLUSION 30

APPENDIX

Appendix A
Fifth Circuit Opinion - 5/2/03 . . . . . 1a

Appendix B
Fifth Circuit Opinion - 3/6/03 . . . . . 4a

Appendix C
District Court Memorandum Ruling and Judgment - 12/17/01 . . . . . 8a

Appendix D
District Court Memorandum Ruling and Judgment - 12/20/01 . . . . . 25a

Appendix E
United States Department of Agriculture Disaster Assistance Programs 1-DAP Amendment 1 . . . . . 41a

Appendix F
United States Department of Agriculture Section 5 Special Provision Crops Par. 1031 . . . . . 43a

Appendix G
United States Department of Agriculture Par. 1032 Aquaculture 46a

Appendix H
United States Department of Agriculture LA Notice DAP-49 Notice DAP-53 . . . . . 57a

Appendix I
1998 Crop Loss Disaster Payment Calculation Worksheet - Belgard 59a

Appendix J
1998 Crop Loss Disaster Payment Calculation Worksheet - Belwise 62a

TABLE OF AUTHORITIES

Statutes:

28 U.S.C. § 1291 1

Fed. R. App. P.4(a)(1)(b) 1

Title 7 CFR 1437 26

Title 7 CFR 1477 . . . . . *passim*

Title 7 CFR 1477.102 (a) 28

Title 7 CFR 1477.102 (b) 2, 6, 19, 24, 28

Title 7 CFR 1477.102 subsection E 7

Title 7 CFR 1477.103 . . . . . 20, 26

Title 7 CFR 1477.110 13-15

Title 7 CFR 1477.110e 5, 14, 23

Title 7 CFR 1477.110(e)(2) 20

Title 7 CFR 1477.203 13

Title 7 CFR 1477.204(i) 13

Title 7 CFR 1477.209 . . . . . 13, 14

Title 7 CFR 1477.209 (a) 13

Title 7 CFR 1477.209 B 17

Article V, United States Constitution 1

Article XIV, Section 1, United States Constitution 1

Other Authorities:

Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act of 1999, §§ 1101 and 1102 (Pub. L. 105-277, 112 Stat. 2681-42 through 2681-44 . . . . . 2, 3, 5, 22

FSA Handbook 1-DAP . . . . . *passim*

PRIOR OPINIONS

The opinion whose review is sought is published and is reproduced in the Appendix at A and B. The District Court opinion is reproduced in the Appendix at C and D.

JURISDICTION

Petitioners seek this Court's review of the judgment entered on May 2, 2003 by the United States Circuit Court of Appeals for the Fifth Circuit, by a Petition for writ of certiorari pursuant to the jurisdiction conferred by rules of the supreme court part III rule 10. This petition is timely filed because it was mailed within ninety days of May 2, 2003, the date a petition for panel rehearing was denied by the United States Circuit Court of Appeals for the Fifth Circuit,. Rules 13.1 and 29.2. Jurisdictional basis for the Fifth Circuit is 28 U.S.C. § 1291 and Fed. R. App. P.4(a)(1)(b), and for the District Court is Title , section 702 and title 7 section 6999 of the United States Code.

CONSTITUTIONAL PROVISIONS

Article V, United States Constitution in pertinent part provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Article XIV, Section 1, United States Constitution in pertinent part provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Title 7 Code of federal Regulations Section 1477

STATEMENT OF THE CASE

Procedural History

This case originates from these petitioners' applications for 1998 disaster benefits from the United States Department of Agriculture (USDA) under the 1998 Crop Loss Disaster Assistance Program (CLDAP). From the District Court's adverse judgment on the Agency's motion for summary judgment, petitioners seek this Court's review of the District Courts action.

Congress authorized the USDA to financially assist agriculture producers who suffered crop losses, including catfish producers, due to disasters in 1998 or in at least 3 of the 4 year from 1994 through 1998 in the Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act of 1999, §§ 1101 and 1102 (Pub. L. 105-277, 112 Stat. 2681-42 through 2681-44, and hereinafter referred to as "the Act."

Congress instructed that this program for disaster relief was to be administered by the Commodity Credit Corporation and carried out by the State and County Farm Services Agency Offices (FSA). Under Title 7 CFR 1477.102 B the State or County Committees and their representatives have no authority to modify or waive any provisions of the program without the Deputy Administrator of Farm Programs (DAFP) approval.

The agency records reflects no formal adoption date whereby the Louisiana State FSA Committee or the FSA County Committee adopted a normal mortality rate of 20.00% for catfish fry and fingerlings as a general applicable application in connection with requests for assistance under the Act. Also, that on June 15, 1999 the Rapides Parish FSA County Committee adopted a maximum loss rate of 60.00% for catfish fry and fingerlings as a general applicable application in connection with request for assistance under the Act. This maximum loss application and normal mortality rate reduction was applied to the Belwise's application on or before May 5, 1999, prior to formal adoption by the agency. The record further reflects that Belwise Aquaculture Systems, Inc., applied for disaster assistance under the Act based on a claim that 80.39% of the catfish fingerlings Belwise was raising died. Belwise Aquaculture Systems, Inc., was raising catfish fingerlings in 8 ponds with an aggregate area of approximately 29.2 acres. Belwise Aquaculture Systems, Inc. claimed that the fingerling losses were lost due to the disaster.

The afromentioned normal mortality rate reduction was applied to the application for benefits of Jimmie and Trudy Belgard on or before May 5, 1999, prior to formal adoption by the agency. The record further reflects that Jimmie and Trudy Belgard applied for disaster assistance under the Act based on a claim that 59.87% of the catfish fingerlings that Jimmie and Trudy Belgard were raising died. Jimmie and Trudy Belgard were raising catfish fingerlings in 6 ponds with an aggregate area of approximately 43.9 acres. Jimmie and Trudy Belgard claimed that the fingerling losses were lost due to the disaster.

Petitioners requested the USDA through the National Appeals Division of the USDA (NAD) to review the FSA's adoption and application of the 20.00% mortality rate in calculation the disaster assistance paid to the petitioners. On

review, NAD, on November 7, 1999 determined use of the 20.00% mortality rate was appealable.

On December 7, 1999 NAD reversed their November 7, ruling and determined use of the 20.00% mortality rate was not appealable. The Belgards then sought review in Federal District Court of this agency action.

Belwise Aquaculture Systems, Inc. sought review of the adoption and application of the maximum loss rate applied to its disaster application by NAD. After a review in favor of the agency Belwise sought judicial Review in District court of this agency action.

In both actions the District Court granted the government's motion for summary judgment on December 17, 2001 and December 20, 2001 respectfully in favor of the Agency. The petitioners moved for appeals on January 16, 2002. The petitioners sought review in the Court of Appeals. The Court of Appeals consolidated these cases for review and after oral arguments on January 8, 2003 the U.S. Court of Appeals affirmed the District Court's granting of the motion for summary Judgment. The Court of Appeals denied the petitioners' Application for Rehearing on May 2, 2003.

From that action the petitioners seek review of this Court.

Facts

Introduction

Petitioners, Jimmie and Trudy Belgard and Belwise Aquaculture Systems, Inc., contend that the FSA's adoption and application of a 20% mortality rate reduction to their beginning disaster inventories is not supported by DAFP authority or the agency records. That the adoption and applications of the mortality rate to their CLDAP applications were arbitrary and capricious acts by employees of the FSA to reduce their disaster benefits.

Petitioners contend that agency records contains no Title 7 statutory regulations and/or DAFP approved FSA Handbook 1-DAP amendment or provision allowing or instructing the Louisiana FSA to establish and apply a normal mortality to any Value Loss crop program applicant. Neither does it contain any creditable and reliable evidence to support the FSA's adoption and application of the 20.00% normal mortality rate as a general applicable reduction to the beginning disaster inventories to determine any level of disaster assistance payable to the petitioners under the Act. The FSA did not provide information and/or documents regarding whether or not the loss payment rates and factors were actually established by the State FSA Committee or by any USDA procedures or by any approval provided by the DAFP to establish a normal mortality factor for fingerling losses. Neither did the FSA provide an explanation or documentation as to why the petitioners' acceptable production records were not used in calculating their respective losses and disaster benefits.

Petitioners also contended that the adoption and application of a 60% maximum loss rate to the Belwise application was not authorized by Title 7 statutory regulations, DAFP approved amendment to or provision of FSA 1-DAP. These petitioners submitted acceptable, reliable and verifiable production records and these records did not indicate any ineligible disaster losses. FSA accepted the records as acceptable and verifiable production records as required by Title 7 CFR 1477.110e and FSA Handbook 1-DAP. Paragraph 1065 (B).

The Agency responded to the petitioners' actions by filing motions for summary judgment. From the granting of those motions for summary judgment on December 17, 2001 and December 20, 2001 by the District Court in favor of the Agency the petitioners moved for appeals on January 16, 2002.

REASONS FOR GRANTING THE PETITION

Relief Sought

These petitioners, Jimmie and Trudy Belgard and Belwise Aquaculture Systems, Inc., are not as the District Court and the FSA depicts, just unsatisfied with the amount of money they received. These petitioners lost other fingerling immediately after the disaster program, Value Loss, cut off date of September 31, 1998. These petitioners understand that because of the Value Loss Program regulations these losses can not be counted. The simple fact is, that from the day these petitioners filed their 1998 CLDAP applications until today the FSA, USDA, the District Court and the Court of Appeals has failed to show by what authority under the law the Louisiana State FSA Committee, the Louisiana FSA State Office or the Rapides Parish County Committee (COC) had to establish and apply a 20% mortality factor to the Belgards' and Belwise's disaster applications and an additional 60% maximum loss factor to Belwise thereby reducing their benefits award.

Congress instructed that this program for disaster relief was to be administered by the Commodity Credit Corporation (CCC) and carried out by the State and County FSA Offices. Under Title 7 CFR 1477.102 B the State or County Committees and their representatives have no authority to modify or waive any provisions of the program. The Agency argued and the District Court and Court of Appeals agreed that 20% of catfish fingerlings would die in a production cycle. However, there is not a single provision in either Title 7 of the CFR or in any other statutory or regulatory authority that authorizes the Louisiana State Committee, its representatives or the Rapides Parish COC, its representatives or the Louisiana State FSA Office agents to establish and apply such a normal mortality factor to these petitioners'

CLDAP applications without specific approval to modify the CLDAP program provisions.

Under subsection E of Title 7 CFR 1477.102 The Deputy Administrator may authorize the State and county committees to waive or modify deadlines or other program requirements in cases where lateness or failure to meet such other requirements does not adversely affect the operation of the program or when, in his discretion, it is determined that an exception should be allowed to provide for a more equitable distribution of benefits consistent with the goals of the program provided for in this part.

This provision deals only with time periods and deadlines not with substantive program provision affecting the benefits an applicant would receive. There is nowhere in the record before this Honorable Court any such authorization to such an extent as to modify and alter the, Value Loss Crops, program provisions by establishing and applying a normal mortality factor, because it never occurred.

FSA Handbook 1-DAP, the implementation instruction manual to the State and County FSA Committees and their representatives paragraph 1032 (Appendix G) are the implementation provisions concerning CLDAP program for aquaculture producers. Also in 1-DAP Paragraph 2 (B) established that this handbook for the 1998 CLDAP program implementation may be supplemented by the State Committee with the approval of the DAFP (Appendix E). It also, established that FSA Handbook 1-AS had the procedures for seeking approval of any requested supplement provisions.

FSA Handbook 1-AS provides the State or County representative must present some form of adoption documentation that must be approved by the State Executive Director, a special reviewing committee within the Deputy Administrator's Office and the DAFP. This approval and the supplement provision would then be incorporated into the FSA Handbook 1-DAP as an amendment. No such document

in compliance with 1-AS and 1-DAP Paragraph 2 (B) or the incorporation of a DAFP approved amendment to 1-DAP exists in the record showing that either the State or County FSA offices in this matter sought approval for establishment and adoption of a 20% mortality factor for catfish fingerlings. The FSA has failed to show NAD, the District Court, or the Appeals Court any such documentation. Counsel for the agency argued in oral arguments on January 8, 2003 before the Appeals Court that FSA needed no approval or authority to make these modifications.

However the Louisiana State FSA office did in fact seek such authorization to modify the CLDAP provisions on other crops such as establishing and applying a normal mortality factor in the Tree assistance program as identified by Louisiana Amendment 1. An amendment to the program provisions is what the FSA was required to receive from the DAFP as a regulatory approval to alter or modify the program provisions, or "Fill in the Gaps." As required by the DAFP this amendment was incorporated in to FSA Handbook 1-DAP.

1-DAP was modified several times by the State FSA office for pasture carrying capacities, for yield reductions for double cropped soybean and grain production, and 5 to change the crop year on the livestock assistance program. All of the aformentioned were incorporated in to the 1-DAP handbook. Nowhere in the whole process of the appeals and litigation of these petitioners' CLDAP claims has the FSA produced any such an amendment to establish and apply a 20% mortality rate or establish and apply a maximum loss factor to catfish fingerling productions. There is no such amendments in the Louisiana FSA record before the Courts because one was never done. There was in fact no request and/or approval to establish and apply such normal mortality and maximum loss factors in the 1998 value loss crops program. There was no such request and/or approval to "Fill in the Gaps." Quite

simply the State and County FSA offices ignored their own internal directives and reduced these petitioners' CLDAP benefits to financially cripple the petitioners and make them go away, but they have not.

The State and County FSA office's repeated disregard for the rights of these petitioners is further evidenced in the Agency record on two forms. The first is the Form CCC 545, (Appendix I, fold-out) that was completed prior to the petitioners' production information being uploaded to the National FSA computer network. The second is Form CCC 540A (Appendix J, fold-out) which is a computer-generated sheet showing these petitioners' production information. Both of these forms were used by the FSA in calculating the 1998 Crop Loss Disaster Assistance benefits. The affidavit in opposition to summary judgment by Jimmie Belgard reflects that Robert Bradley took the information from Mr. Belgard for these petitioners' CLDAP applications and Mr. Bradley did the reductions before entering that information on the Form CCC 545. Mr. Bradley applied the normal mortality to both Belgard and Belwise and a maximum loss factor to Belwise. Mr. McCain, at the Rapides Parish County FSA office uploaded the petitioners' applications on May 5 1999 to the national data base upload. This act was done knowing that the information on the Form 545 did not represent the information Mr. Belgard had submitted to Mr. Bradley. The Rapides Parish COC did not consider or approve these petitioners' applications for payment until June 15, 1999.

Both Forms CCC 545 and CCC 540A have a line for the FSA to indicate the dollar value of ineligible losses the applicant suffered. Neither form has a place to list a dollar value of loss and/or percentage of loss for normal mortality or maximum loss. On Form CCC 545 line 13 is where the dollar value is to be entered for any ineligible causes of loss to the inventory. The dollar value of ineligible losses on line 13 is to be added to the dollar value of inventory after the

disaster as listed on line 12 resulting in field market value B on line 14. On Form CCC 540A line 32 is where the dollar value of ineligible causes of inventory loss is to be listed. Line 33 determines the market value B. On both the forms 545 and 540A of these petitioners' applications show they had no dollar value of ineligible causes of inventory losses. Why did the FSA, when these forms were completed, identify that these petitioners had zero losses for ineligible causes to reach a market value B, but now claim, and the District Court agreed as affirmed by the Court of Appeals, these petitioners clearly suffered 20% normal mortality and Belwise an additional 40% of some unnamed ineligible cause of death to it's inventory? Why did the agency representative on his agency forms not show there were ineligible losses? These are questions of fact unanswered and are material to the petitioners' claims that the agency acted beyond its authority.

The affidavit of Jimmie Belgard in opposition to summary judgment indicates that Robert Bradley from the Louisiana State FSA Office took these petitioners' submitted acceptable records of information and reduced the beginning dollar value of inventories by applying a normal mortality. He then increased the dollar value of inventory after the disaster by applying a maximum loss. Both, reduction to beginning disaster inventories and the increase to ending disaster inventories were made by Mr. Bradley before entering the information on the form CCC 545. Also, Mr. Belgard indicated that Mr. McCain, County Executive Director of Rapides Parish, uploaded the same to the Form CCC 540A with the knowledge that the figures did not reflect the information or records these petitioners had submitted.

The Louisiana State FSA Office and the Rapides Parish County FSA Office reduced these petitioners' benefits by applying a normal mortality factor to both Belgard's and Belwise's beginning inventories and a maximum loss to Belwise's ending inventories. They then entered this reduced

and increased information onto the forms 545 and 540A, so they could conceal the fact that FSA had reduced these petitioners' benefits without showing any ineligible cause of inventory loss. Clearly both forms provide an area to list and calculate such a reduction, so why did the FSA conceal such a reduction? The answer is because the State or County FSA never had approval from the DAFP, as required by FSA 1-DAP and 1-AS to make such reductions. These actions were in clear contravention of their internal directive as issued in LA NOTICE DAP-49, DAFP notice 53 (Appendix H). "That it is extremely important that the county offices understand that any manual applications (Form 545) that are under appeal shall be loaded into the automated system with an enrollment date entered. The data entered into the automated system should reflect the information provided by the producer. The data entered into the system as evidenced by Form 540A does not reflect the information provided by these petitioners.

In this value loss program any deductions for ineligible losses made to inventories of the applicants were to be physically identified on the form CCC 540A and the information the producer provided was to be entered and any ineligible causes of inventory loss be calculated into the overall automated calculation. This was because the ineligible causes had to be identified so the automated system would calculate the deduction. Mr. Bradley, before entering any information or figures on the manual form 545, reduced these petitioners' benefits by altering and/or changing the information submitted by petitioners. After these petitioners' submitted records were altered they were entered onto the manual form 545 by Mr. Bradley. Mr. McCain then transferred them from form 545 to the automated form 540A. No automated deduction was done on the CCC 540A. Mr. Bradley did not do a manual deduction on the CCC 545.

Further, not only has the absents of authority under the law for FSA to modify the value loss program not been addressed by the Courts. Neither FSA, NAD, the District Court or the Court of Appeals have ever addressed the issue that this value loss program only allowed losses suffered to be claim between July 1, 1998 and September 31, 1998. That this three-month period was not considered a production cycle which was established as one year from September 1 through October 31. Also, that this 20% normal mortality claimed by FSA was also the normal deaths that FSA claimed occurred in this year production cycle.

Neither did they address the issue that the petitioners provided to the FSA an inventory of their ponds before, during and after the disaster period. In this case the FSA was provided acceptable, reliable and verifiable records showing the exact number of fingerlings lost by the petitioners. The FSA, NAD, the District Court and the Court of Appeals ignored the petitioners' records and found that 20% of any applicant's fry/fingerling losses including the petitioners' fingerlings would have died in a production cycle. Which they then related to the three months window of this 1998 value loss program.

Petitioners further argue that the District Court erred in granting summary judgment in favor of the agency on the basis that, NAD, the District Court and the FSA disregarded and ignored any and all acceptable record of production showing the petitioners' actual physical losses. There is no dispute between the parties that catfish fingerling losses as the petitioners suffered are a value loss crop and are calculated as such for determination of losses suffered as a result of this natural disaster under the 1998 CLDAP program. What is in dispute is whether the petitioners' acceptable production records were used properly in calculating disaster benefits.

Also, the FSA, NAD, the District Court and the Court of Appeals ignored the petitioners' records and found that

only 60% of any applicant's fry/fingerling inventory losses could be attributed to this disaster. Thus the FSA assigned the production factors to these petitioners' respective operation rather than calculate their losses based upon the loss of dollar value at the time the disaster occurred according to acceptable and verifiable production records submitted by these petitioners.

Under Title 7 CFR 1477.203 a producer claiming losses has identified obligations and responsibilities. The producer's primary responsibility is to provide acceptable production records of its losses. If the producer fails to produce these acceptable production records then the COC shall assign production 7 CFR 1477.204(i). However the provisions under Title 7 CFR 1477.110 are clearly stated as matters of general applicability, or apply as a general rule to all applications, unless special provisions apply in a given situation. Title 7 CFR 1477.209 (a) indicates that a value loss calculation applies to certain crops, Aquaculture included under this special provision. Aquaculture under these special provisions is further limited only to Aquaculture species placed in a body of water with identifiable boundaries by the producer and specifically exclude losses for natural growing Aquaculture species. This of course only applies to producers with actual records of what species and number of species they have in a given body of water.

This is due to the unique nature of some crops for which disaster assistance is available, special provisions were developed on a national level to assess losses and calculate assistance. These provisions were necessary because special provision crops under Title 7 CFR 1477.209 do not lend themselves to yield calculations or normal production loss situations. Aquaculture, ornamental nursery and Christmas tree are some of the crops that disaster assistance is calculated, based on the loss of value at the time of the disaster and not subjected to assigned production, if

acceptable production records are available from any source. The total value of the catfish inventory will be determined immediately before and after the disaster to determine a producer's losses. As such the Agency by assigning production and establishing a 60% max loss factor and applying that factor to this producer under Title 7 CFR 1477.110(e) is totally disregarding the special provisions under Title 7 CFR 1477.209 and what was required of the producer under Title 7 and FSA 1-DAP.

This is exactly the type of records these petitioners submitted to FSA through Mr. Bradley. The FSA disregarded those records and secretly assigned production to these petitioners' applications by establishing and applying a 20% normal mortality factor and a 60% maximum loss factor to this petitioners' applications. They then claimed under 7 CFR 1477.110(e) they were given the authority to do so. They totally disregarded the special provisions under 7 CFR 1477.209 and what was required of them and these petitioners under Title 7 and FSA Handbook 1-DAP.

Thus these petitioners are not simply dissatisfied with the amount of money they received. They want to know why their rights to equal access and protection under these laws are ignored by FSA and the Courts. Also, why their production records were altered for claims of ineligible cause of loss, but those alterations were concealed from them and the DAFP and not identified clearly on the agency records as a reduction where it was supposed to be recorded.

The District Court found that the agency was authorized to apply a 60% maximum loss level to disaster applications for Aquaculture producers based upon 7 CFR 1477.110(e). In counsels brief in support of summary judgment counsel includes what he considered the relevant provisions.

However the Court should be aware of two (2) factors; 7 CFR 1477.110(e) has three (3) separate provisions that constitute application of a maximum loss under 14 CFR

1477.110. First when the unharvested acreage has not been appraised by FSA, RMA, FLIC, FCIC, or other appraiser. Second when the crop's loss is because of an ineligible disaster condition or circumstances other than a natural disaster, or lastly when acceptable production records for harvested acres are not available from any source.

As to the first factor if some kind of appraisal has been done on the unharvested acreage then the county cannot apply the maximum loss level to that producer. The third factor states that if acceptable production records for harvested acres exist and are available, then the county is also precluded from applying a maximum loss level. Both of these provisions require the producer to have something that shows what their actual losses are. The second provision, and the provision that the agency relies upon in their argument, if interpreted as the agency proposes to the Courts, would allow the agency to apply a maximum loss regardless of a producer's acceptable production records or any appraisal to prove what caused the crop's loss. In the matter before the Court the Petitioners would have to prove the cause of death for each and every individual fish that died during the disaster period. If it failed to prove the cause of death of each and every fish the agency could apply a maximum loss level to their disaster benefits. In context of this petitioner to prove the cause of death would require an autopsy on over 3,527,658 fish, a truly Herculean task.

The petitioners presented acceptable and verifiable production records to the FSA of what their actual losses were during the disaster period. The record does not reveal any cause for the losses other than the natural disaster.

This is a material issue of fact in dispute and should be considered along with the fact that FSA has not yet established by what regulatory and statutory authority the State and County FSA Offices were authorized to establish and apply a 20% normal mortality factor and a maximum loss

factor as a ineligible causes of loss to these petitioners' fingerling operations under the 1998 CLDAP program "Value Loss Crops".

The agency contended on summary judgment, and the District Court and Appeals Court agreed, that the FSA decision to establish and apply a 20% normal mortality factor and maximum loss factor as general applicable reduction was supported by reliable and creditable evidence. Specifically the District Court concluded that there was ample evidence and authority in the administrative records to support the FSA's adoption and application of the 20% normal mortality and a 60% maximum loss figure on fry/fingerling production as general applicable reductions to all fry/fingerling producers including these petitioners.

The agency supported its motion with an affidavit from Robert Bradley, defendant and program specialist. In said affidavit Mr. Bradley states at length that the 20% mortality factor was established from data and consultations with Dr. Greg Lutz and that La notice DAP-20 is based in large part on data supplied by Dr. Lutz and finally that the Agency adopted the 20% mortality factor based on Dr. Lutz's recommendation.

Petitioners showed by their counter affidavit by Dr. Greg Lutz that this is just not true. Dr. Lutz states very clearly that the only data and recommendations that he made to the FSA and Mr. Bradley concerning the creation of La notice DAP-20 was limited to Part 4 Section C. [miscellaneous information], and his recommendations were based on a yearly production cycle. Clearly the best evidence before the Courts on the summary Judgment of what Dr. Lutz's statements were, concerning this issue, is the statement of the declarant himself, and not Mr. Bradley's self-serving affidavit based on what Dr. Lutz may or may not have said. The District Court further relies on the evidence in the record that Mr. Bradley also relied upon in reaching his decision. That being these

mysterious and unnamed "Other" producers who confirmed the 20% mortality rate. What these "Other" producers experience actually is, Mr. Bradley does not say. Clearly, this conclusion is fraught with problems and is a totally unreliable conclusion by Mr. Bradley, further this conclusion is hearsay of an unknown and unidentifiable declarant and is inadmissible for consideration to support a summary judgment and should be discounted in the agency reaching any conclusion that would reduce these petitioners disaster benefits. Why the FSA is so secretive as to the identity of these "Other " producers is questionable and the petitioners feel that the District Court erred in basing any decision on the summary judgment decision upon these alleged hearsay statements by unknown declarants.

The agency also argues that the adoption and application of a 20% mortality factor and the 60% maximum loss factor is supported by the code of federal regulation and the enabling legislation. It is argued that the Secretary of the USDA is given discretion to determine when assistance is warranted due to disaster. As a result the USDA established a program and adopted part 1477 of title 7 of the code of federal regulation. The Agency indicated that these petitioners' disaster application for catfish losses would be calculated as a value loss crop. Title 7 code of federal regulation 1477.209 B defines disaster benefits under this sub-part are calculated based on the loss of value at the time of disaster, as provided by instructions issued by the deputy administrator. FSA Handbook 1-DAP Paragraph 1020 (H) states, value loss crops because of their unique nature do not lend themselves to yield calculations (maximum loss is a yield calculation) or expected yield loss situations (normal mortality is a expected yield loss situation). Value loss is determined based on a loss of value at the time of the disaster. See Section (5).

The FSA decided that even in a value loss calculation the agency could apply a normal mortality factor defined as the

percentage of dead aquaculture species that would normally occur during the crop year. Further, that no benefits will be paid for losses not the result of the natural disaster. For the purpose of the 1998 1-DAP CLDAP Value Loss Crops, normal mortality is not defined. The only definition for normal mortality effecting the 1998 CLDAP is found in FSA Handbook 1-DAP Exhibit 2 and is designated to Trees and Vines not aquaculture or any other DAFP designated value loss crop.

The issues that were before the District Court, the Appeals Court, and now before this Honorable Court is whether the Louisiana FSA Agency had proper authorization under the law to apply a 20% normal mortality factor as a general applicable reduction to these petitioners' disaster applications that was based on a several day period and not on a production cycle. The District Court found that a percentage of catfish fingerlings will always perish under normal, non-disaster conditions. But the fact is, in this case the record reveals that the petitioners had very specific records that show their inventory before the disaster period, during the disaster period and their inventory after the disaster period. Also the issue of whether the Louisiana FSA Agency had proper authorization under the law to apply a 60 % maximum loss factor as a general applicable reduction to all fry/fingering applicants including these petitioners' applications with out indicating the cause of loss used to establish and apply these reductions.

Petitioners argue that the fingerling losses they sustained during the disaster period are what they should be paid for. These fingerling losses were the result of the disaster. There is no creditable or reliable evidence or data in the agency records that show the petitioners' fingerlings died from any cause other than the disaster. Further there is nothing in the record that supports the conclusion that the petitioners'

fingerling operations' did in fact suffer fingerling losses of 20% normal mortality.

What the FSA says, without any creditable data or expert opinions, is that some percentage of everything will fail to attain maturity under normal conditions. That may or may not be true, that is a question of fact not supported by this agency record, but to state an arbitrary percentage without any factual support is not what Courts of law do. The FSA claims that it is immaterial that some other percentage of mortality could be reached. But that the test is whether the Agency's conclusions of a 20% mortality factor is attributed to a plausible point of view or agency expertise based on the information considered. Mr. Bradley has stated that Dr. Lutz was his source for determining 20% as the factor to be used. Dr. Lutz never made that opinion in part 4 Section C of La notice DAP-20. So where are the facts that support a plausible point of view or expertise of the Agency, those facts are just not in the record.

The petitioners further argue that the District Court erred in relying upon La DAP-20 as substantive law that regulated the FSA's determination of eligibility and benefits under the CLDAP program. The 1998 CLDAP program was implemented to provide agriculture producers relief from the summer heat and drought of 1998. This program was implemented by the USDA through the Commodity Credit Corporation with the Deputy Administrator of Farm Programs being the only authority that could authorize the adoptions of any booklet as regulatory (i.e. Louisiana Dap-20) or the modification or alteration of any provision that would change the way benefits were to be calculated (i.e. applying 20% Normal Mortality and 60% maximum loss) under Value Loss Crops. Congress has directly spoken to the precise question at issue, State and County FSA Committees and representatives do not have the authority to modify or waive any of the provisions of this part. See 7 CFR 1477.102 (b).

From this Congress authorized the drafting of FSA Handbook 1-DAP paragraph 2 subparagraph (B) and 1-AS for proper supplementation procedures. The intent of Congress is clear, it left no gaps for Louisiana FSA to fill with out proper authorization. The only supplementation allowed was through the procedures outlined in 1-AS. The provisions regulating the manner in which this 1998 CLDAP was to be administered is clear. Provisions regulating the value loss crops program could not be added to (gaps filled in), modified, amended, waived or supplemented (Louisiana DAP-20) without the Louisiana FSA first applying for such by following strict procedures set forth in 1-AS and the DAFP placing his signature for final approval on same. The agency record does not show any such modification because it never occurred.

These petitioners' applications was reduced by the 20% normal mortality factor by the State FSA and the COC independent of any authority to do so by the DAFP. This is not "filling in the gaps," this amounts to unauthorized action by employees of the State FSA and COC to thwart the intent of Congress to provide disaster assistance to these petitioners.

Essentially the question for this Court to decide is, whether the District Court erred in it's decision that 7CFR 1477.110(e)(2) and the definitions of 7CFR 1477.103 supercedes all other provisions in title 7 of the Code of Federal Regulation and the related provisions set forth in FSA Handbook 1-DAP. Thereby giving the Louisiana State and County FSA representatives the explicit authority to establish and apply a 20% mortality factor to these petitioners' applications without any necessity to have the approval of the DAFP to such changes when Congress explicitly authorized the DAFP as the only representative with authority to change program provisions.

Further the agency, if it had authority to apply a mortality factor at all, that percentage of that factor should be the

percentage of normal death of Aquaculture species within the time period between July 1, 1998 to September 31, 1998 and based upon the producers acceptable records, not a percentage based upon a yearly cycle ignoring the producers acceptable records of inventory loss.

The Agency never provided any information or documents regarding whether or not the loss payment rates and factors used in the calculation of these petitioners' applications were actually established by the State Committee or any procedures provided by the DAFP, or the agency's authority to establish a normal mortality factor based on information obtained from other states. Specifically, the regulations are silent with regard to the application of normal mortality with regards to Aquaculture. The agency has never provided an explanation or documentation as to why these petitioners' records were never properly used to calculate these petitioners' disaster benefits. Because the state or county committee and their representatives does not have authority to modify or waive any provisions of 1477 title 7 of the code of federal regulation and there was no amendment to these provisions in the agency records authorized by the DAFP according to FSA Handbook 1-DAP Paragraph 2 (B) and 1-AS for proper supplementation procedures, to establish and apply a normal mortality to value loss crops, the calculation of losses for a value-loss crop is addressed when there is a limited time period of losses less than a yearly cycle in handbook published by the DAFP of the Agency. In special provisions crop Paragraph 1031 Subparagraph B, D, and E, disaster assistance for value-loss crops is calculated based upon the loss of value at the time of the disaster. Any determinations concerning the value of the loss of the unit must be made. It is important that a loss of value of any portion in the producer's inventory, because of the disaster, be determined and established only if that portion of the inventory is not marketable in any market, now and in the future. (FSA handbook disaster Assistance Program for

state and county offices, short reference 1-dap paragraph 1031 and 1032). The agency cannot arbitrarily make up and apply a normal mortality factor and a maximum loss factor to reduce these petitioners' benefits when the instructions issued to the agency from the DAFP do not make a provision for those arbitrary reductions.

The agency has attempted to reduce these petitioners' benefits by arbitrarily modifying their own regulations and provisions and has concluded that regardless of what the petitioners would have done, 20% of their fish would have died even if there were no natural disaster during the time period between July 1, 1998 and September 31, 1998. This conclusion is unsupported in the agency record by substantial evidence. The agency decision was arbitrary and without justification.

There are serious material issues in dispute as to whether the agency supported its decision to apply a normal mortality factor to these petitioners' disaster applications with proper authorization and creditable and substantial evidence. What is in the records are hearsay statements by unknown declarants and possible fictitious individuals, and expert opinions now denied as being expert opinions by the declarant. Quite simply, the agency has still yet to show even on summary judgment by what authority in either the act itself, the code of federal regulation, or by authorization from the DAFP, whereby it was allowed or instructed to establish, adopt and apply the normal mortality factor or the maximum loss factor that was applied to these petitioners' applications for disaster assistance.

Further the agency record lacks any evidence to support the establishment of a 60% max loss factor. This figure appears to have been pulled out of the air and is in fact the essence of an arbitrary agency action. By establishment of this factor the agency is saying that 40% of this producer's fingerlings died from something other than a natural disaster.

If the Court consider that the agency was justified in the application of a normal mortality factor of 20% under La Notice DAP-20 and the federal regulations, then by the definition of normal mortality said normal mortality would be an ineligible cause for disaster benefits, same as those ineligible causes found in 7 CFR 1477.110(e). So the agency's position is that this producer would have lost 20% of its catfish between July 1, 1998 and September 31, 1998 due to an ineligible cause being normal losses during the production cycle and that on top of that it would loose another 40% of the remaining fish after deduction for normal mortality due to some other unidentified ineligible disaster condition other than normal mortality. What those conditions are no one seems to know or care.

Further the minutes of the Rapides Parish COC meeting of June 15, 1999 the COC reviewed the application for CLDAP benefits of Belwise. The COC determined that the Belwise application lacked verifiable information to approve the application as requested and assigned production. Even the State executive Director of the FSA acknowledged to the Director of NAD on October 27, 1999 that assigning production by application of a maximum loss only applies to producers without acceptable production records. (TR 161-164) The agency has admitted that Belwise had acceptable and verifiable production record on this CLDAP application, but assigned production anyway because the agency assigned this production to all catfish fry/fingerling producers in the state under the statue 7 CFR 1477.110 e general applicability.

Bottom line is the agency has arbitrarily and capriciously double dipped upon Belwise's benefits by claiming twice a percentage for ineligible losses, not due to the disaster conditions, without offering any kind of authorization or reliable evidence to support these reduction factors. Clearly the FSA appears on the face of the record to have calculated a reduction for normal mortality twice by using both the

normal mortality factor and by assigning production and applying a maximum-loss percentage to Belwise's application.

There are multiple unanswered questions in these matters that preclude the dismissal of these petitioners' cases on summary judgment. Further there are material issues in dispute and the government never presented to the District Court or Appeals Court the Statutory or Regulatory authority by which a normal mortality factor was established and applied to these petitioners' CLDAP benefits. The District Court declares that title 7 of the Code of Federal Regulation gave the agents of the FSA broad authority to fill in the gaps and essentially do whatever they wanted. Even to the point of unilaterally and without the approval of the DAFP. This is exactly what Willie Cooper, Robert Bradley, and Mr. McCain did. Ignoring their own internal directives and the mandates of 1-DAP and 7 CFR 1477.102 B. Altering worksheets to hide calculation, these acts are by there very nature arbitrary and capricious acts done to deprive these petitioners of the benefits for disaster assistance they applied for. Petitioners argue to this Court that this is more than filling in gaps, these actions are in direct contravention of the desire of Congress and the intended purpose of the CLDAP. This intent being to help quickly and effectively assist agriculture producers with financial compensation and give needed economic relief to agriculture producers that suffered losses in 1998. And that this Court should give these petitioners the opportunity to pursue their claims against all the named defendants in this matter.

The Appeals Court opinioned that these petitioners conceded in oral arguments on January 8, 2003 that FSA had the authority to apply the normal mortality and maximum loss factors to their assistance applications.

Petitioners contend they did not concede, Louisiana State FSA had authority and/or authorization to apply a normal mortality factor and a maximum loss factor as general

applicable reduction to petitioners' disaster losses as submitted in their applications for disaster assistance under the 1998 CLDAP Value Loss Crops.

Louisiana State FSA contends that they needed no specific authority to apply a normal mortality factor or a maximum loss factor as a general applicable reduction to crop disaster losses of aquaculture under the 1998 CLDAP Value Loss Crops. They contend these acts were merely filling in the gaps left by Congress. This contention has been widely argued in NAD, the U.S. District Court, and in oral arguments on January 8, 2003 before the Court of Appeals by counsel for the government.

In the January 8, 2003 oral arguments, Counsel for the government also argued that Louisiana State FSA had to reinvent the wheel in administering this 1998 CLDAP for aquaculture.

Louisiana State FSA "did not have" and "were not given" authority by Congress, the Code of Federal Regulations, related FSA Handbooks or amendments to FSA Handbooks to reinvent the wheel or to adopt and apply a normal mortality factor as a general applicable reduction to catfish farmers beginning disaster inventories of catfish fingerlings. Also Louisiana State FSA "did not have" and "were not given" authority by the afor stated to adopt and apply a maximum loss factor as a general applicable reduction to all catfish disaster losses under the 1998 aquaculture CLDAP Program "Value Loss Crops".

Also petitioners contend Louisiana State FSA "did need to" and "did not request and/or receive" authorization from the DAFP, to apply a normal mortality and a maximum loss factor, through the procedures of 1-AS, to crop disaster losses in the 1998 CLDAP for aquaculture under Value Loss Crops.

Whether the Louisiana State FSA had authority to act without the written approval of USDA is an issue of fact in dispute that has not been addressed by application of law in

the District Court or the Appeals Court and should preclude the granting of summary judgment on these cases.

In oral arguments the Appeals Court asked the definition of normal mortality. This definition of terms used in this handbook states: Normal Mortality means the percentage of damaged or dead trees or vines in the individual stand that normally occurs in a 12-month period. There is no definition for normal mortality in this FSA Handbook 1-DAP that includes aquaculture.

A definition of normal mortality found in Title 7 CFR 1477.103 respecting aquaculture does not apply to the 1998 CLDAP Program Value Loss Crops.

In the year 1994 USDA administered a CLDAP for aquaculture. This program was a 12-month crop year yield based program.

The Secretary of USDA through the DAFP authorized in 1994 the use of a normal mortality for aquaculture as a 12-month crop year yield based program and issued instruction as to how the mortality would be administered. A normal mortality factor was adopted and applied by Louisiana State FSA to all catfish producer applications for disaster assistance in that year. This mortality was applied to beginning inventories of all applications for disaster losses to catfish fry, fingerling, food and brood fish.

If definition or meaning as listed in the Code of Federal Regulations and respected handbooks are applicable law giving authority or restricting authority to adopt and apply, should not this Honorable Court consider the definition and/or meaning of Value Loss Crops, which included all catfish in the year 1998.

Title 7 CFR 1477.103 defines Value Loss Crops as having the same meaning as assigned in Title 7 CFR 1437. FSA 1998 Handbook 1-DAP Par. 1020 (H) gives the same meaning as found in CFR 1437. Also FSA Handbook 1-DAP Exhibit (2) at Page (4) respects the same meaning as the above. The

aforementioned defines or gives meaning to Value Loss Crops as being so unique in their nature that they do not lend themselves to yield calculations (maximum loss is a yield calculation) or expected yield loss situations (normal mortality is a expected yield loss). Clearly the intent of the drafters (USDA) of this definition (Value Loss Crops) was that maximum loss and normal mortality not be used to calculate disaster losses to Value Loss Crops.

FSA Handbook 1-DAP par. 1020 (H) also adds Value loss is determined based on a loss of value at the time of the disaster. See Section (5).

Crop losses are determined to value loss crops by acceptable production records provided to State FSA by producers for the set period of disaster. Without acceptable production records of inventories and losses at the time of disaster, (July 1,1998 through September 31,1998), a producer could not qualify for disaster assistance under the 1998 value loss crops program. These petitioners provided acceptable production records to the State FSA.

The District Court and the Appeals Court has been misinformed or has misunderstood why these petitioners sought review of the Courts to this agency action. These petitioners were not asking to be paid for their entire crop losses. Although petitioners had other losses, USDA laws and related provisions relative to the CLDAP Value Loss Crops did not allow benefits for losses other than those that occurred in July through September 1998. The same USDA laws and related provisions call for all aquaculture Value Loss crop applicants with acceptable production record to be paid for their crop losses within this three month window. Louisiana State FSA ignored these laws and related provision and reduced these petitioners' losses at their own will and /or pleasure. These acts violated these petitioners' civil right to equal access and protection under these laws.

Christmas tree crop producers were the only producers that could apply for crop losses under the 1998 Value Loss Crop Program "or" under a 1998 single year crop yield based program 1-DAP-TAP.

The 1998 value loss program disaster period for Christmas Tree losses were as those set for aquaculture, shorter than a 12-month crop year. Producers were required to submit acceptable production records for the time of disaster and had no normal mortality or maximum loss applied.

The 1998 single year crop yield based program 1-DAP-TAP included losses for the entire 12-month crop year and did not require acceptable production records. However, the crop year yield based program 1-DAP-TAP required by instructions from the DAFP a normal mortality factor to be adopted and applied. The DAFP also allowed a maximum loss adoption and application for having no acceptable production records.

Title 7 CFR 1477.102 (a) provides; The program will be administered under the general supervision of the executive vice president of the CCC, and shall be carried out in the field by state and county Farm Service Agency (FSA) committees.

This clearly and unambiguously expressed the intent of Congress, Secretary of USDA, Executive Vice President of CCC and the DAFP. This intent clearly stated Louisiana State FSA's authority was only to carry out in the field as instructed.

Title 7 CFR 1477.102 (b) provides; State and county FSA committees and representatives do not have the authority to modify or waive any of the provisions of this part. This regulation gives even more clarity to the intent than previously mentioned that Louisiana State FSA was to carry out these programs as instructed and had no authority to modify or change any part and/or provision at its' own will or pleasure.

FSA Handbook 1-DAP par. 2 (B) provides: State FSA office Authority to Supplement This Handbook. This provision does not eliminate any procedure in this handbook. This handbook may be supplemented with State Committee policies that have received DAFP authorization. See 1-AS for proper supplementation procedures.

If, Louisiana State FSA felt the 1998 value loss crop program for aquaculture had gaps in its' instructions or needed to be supplemented and/or modified to make for a more equitable distribution of benefits, the DAFP provided the State Agencies with this FSA Handbook 1-DAP par. 2 (B) and FSA Handbook 1-AS.

If, Louisiana State FSA had observed and followed proper laws, provisions, procedures and requested authorization to apply a normal mortality to fry/fingerling producers and apply a maximum loss factor as a general applicable reduction to all aquaculture producers' disaster losses one of two responses would have occurred.

DAFP would have authorized the modifications and/or changes with a written amendment to FSA Handbook 1-DAP or the director would have rejected the request for modification and/or changes.

If, the DAFP would have authorized or rejected these modification and/or changes to this value loss crop program in written form these cases would not be before this Honorable Court nor would have they been before any other court.

There are no request found whereby the Louisiana State FSA requested authorization from the DAFP to modify and/or change the disaster loss calculation method in the 1998 value loss crop program. Also no authorizations are found whereby DAFP authorized through amendments to FSA Handbook 1-DAP the adoption and application of a normal mortality to beginning inventories of fry/fingerling and the adoption and

application of a maximum loss factor as a general applicable reduction to all aquaculture disaster loss applications.

Louisiana State FSA has not shown by brief or by oral argument the authority (law or provision) or authorization (amendment from DAFP) whereby they adopted and applied a normal mortality or a maximum loss to these petitioners' applications for disaster assistance as submitted under Value Loss Crops Program.

Louisiana State FSA's "act" of not following proper procedures and adopting and applying a normal mortality factor and a maximum loss factor in these petitioners' cases at its' own will and/or pleasure was arbitrary, capricious, abuse of discretion, and contrary to law. These "acts" were clearly unsupported by substantial evidence of authority in law to act.

The "acts" committed by Louisiana State FSA violated these petitioners' civil rights to equal access and protection under the law.

Clearly there are material issues of fact in dispute. To disallow these petitioners the right to a full trial in the courts would deprive them of due process in the review of this agency's actions.

CONCLUSION

In conclusion, petitioners, Jimmie and Trudy Belgard and Belwise Aquacultural Systems Inc., respectfully prays that a writ of review be issued by this Court and this matter be subject to remand and referred to the merits with summary judgment being inappropriate in this case, and to grant all other requested relief as the Court may deem proper.

Respectfully submitted,

Paul A Lemke III
PO BOX 595
Harrisonburg, LA 71340
(318)744-5431
Attorney for Jimmie and Trudy Belgard
And Belwise Aquacultural Systems Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed May 2, 2003]

No. 02-30091

TRUDY TYLER BELGARD; JIMMIE BELGARD,
Plaintiffs - Appellants

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; ANN VENEMAN, SECRETARY, DEPARTMENT OF AGRICULTURE; WILLY COOPER, Executive Director for Farm Service Agency for Louisiana; CRAIG MCCAIN, County Executive Director; ROBERT BRADLEY, Farm Service Agency Program Specialist,
Defendants - Appellees;

No. 02-30306

BELWISE AQUACULTURE SYSTEM INC,
Plaintiff - Appellant

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; ANN VENEMAN, SECRETARY, DEPARTMENT OF AGRICULTURE; FARM SERVICES AGENCY; WILLY COOPER, Executive Director of Farm Service Agency for Louisiana; CRAIG MCCAIN, County Executive Director; ROBERT BRADLEY, Farm Service Agency Program Specialist,
Defendants - Appellees

Appeals from the United States District Court
for the Western District of Louisiana, Alexandria

JUDGES:
Before KING, Chief Judge, and DeMOSS and CLEMENT, Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ _____
Edith Brown Clement
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed March 6, 2003]

No. 02-30091

TRUDY TYLER BELGARD; JIMMIE BELGARD,
Plaintiffs - Appellants

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; ANN VENEMAN, SECRETARY, DEPARTMENT OF AGRICULTURE; WILLY COOPER, Executive Director for Farm Service Agency for Louisiana; CRAIG MCCAIN, County Executive Director; ROBERT BRADLEY, Farm Service Agency Program Specialist,
Defendants - Appellees;

No. 02-30306

BELWISE AQUACULTURE SYSTEM INC,
Plaintiff - Appellant

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; ANN VENEMAN, SECRETARY, DEPARTMENT OF AGRICULTURE; FARM SERVICES AGENCY; WILLY COOPER, Executive Director of Farm Service Agency for Louisiana; CRAIG MCCAIN, County Executive Director; ROBERT BRADLEY, Farm Service Agency Program Specialist,
Defendants - Appellees

Appeals from the United States District Court
for the Western District of Louisiana, Alexandria

JUDGES:
Before KING, Chief Judge, and DeMOSS and CLEMENT, Circuit Judges.

OPINION

EDITH BROWN CLEMENT, Circuit Judge:

Plaintiffs-Appellants Belwise Aquaculture Systems Inc. ("Belwise") and Trudy and Jimmie Belgard ("the Belgards") appeal the district court's grant of summary judgment in favor

of the Defendants-Appellees. We affirm essentially for the reasons given by the district court.

Belwise and the Belgards are engaged in the business of farming and harvesting catfish fingerlings in Louisiana. In 1999, Belwise and the Belgards sought relief under the Crop Loss Disaster Assistance Program ("CLDAP") for losses suffered due to excessive heat during the summer of 1998. Belwise and the Belgards lost approximately 90 and 60 percent of their catfish fingerlings, respectively.[1] The U.S. Department of Agriculture ("USDA") distributed compensation to Belwise and the Belgards through the CLDAP, but they were unsatisfied with the amount of disaster assistance they received because the USDA did not compensate them for the loss of the entire crop. Instead, the USDA reduced their compensation based on two scientific conclusions: (1) 20 percent of the catfish fingerlings would die in normal circumstances, and (2) a maximum of 60 percent died as a result of the excessive heat in 1998. Belwise and the Belgards unsuccessfully challenged the USDA's reduction of their compensation in a series of administrative actions. In December 2000, pursuant to 5 U.S.C. § 702 of the Administrative Procedure Act and 7 U.S.C. § 6999, Belwise and the Belgards filed suit in federal district court. The district court granted summary judgment in favor of the Defendants-Appellees.

---

[1] Even in the absence of excessive heat, it is normal for those engaged in the farming and harvesting of catfish fingerlings to lose a certain percentage of catfish fingerlings.

This Court reviews grants of summary judgment *de novo*. *Travelers Cas. & Sur. Co. of Am. v. Baptist Health Sys.*, 313 F.3d 295, 297 (5th Cir. 2002). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). We view all evidence and factual inferences in the light most favorable to the party opposing the motion." *Id.*

During oral arguments, Belwise and the Belgards conceded the authority of the USDA to establish a normal mortality rate and a maximum loss rate. However, Belwise and the Belgards argued that: (1) the USDA did not follow the proper procedure in establishing the normal mortality rate, and (2) the USDA was obliged to consider any identifiable records supplied by the Plaintiffs-Appellants before applying the maximum loss rate.

Viewing the evidence in the light most favorable to the non-movant, we conclude that there is no genuine issue of material fact essentially for the reasons set forth by the district court. Therefore, the Defendants-Appellees are entitled to judgment as a matter of law.

Accordingly, the district court's grant of summary judgment in favor of the Defendants-Appellees is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
ALEXANDRIA DIVISION

CIVIL ACTION NO. 00-2664
SECTION "A" (JUDGE LITTLE)

[Filed December 17, 2001]

JIMMIE BELGARD, et ux	)
	)
-vs-	)
	)
UNITED STATES DEPARTMENT OF AGRICULTURE, et al.	)
	)

JUDGES: F. A. LITTLE, JR., CHIEF JUDGE, UNITED STATES DISTRICT COURT.

MEMORANDUM RULING

Before this court is a Motion for Summary Judgment [Doc. No. 17] filed by defendant, United States of America (the "United States") for the United States Department of Agriculture (the "USDA"), Willie Cooper ("Cooper"), Craig McCain ("McCain"), and Robert Bradley ("Bradley"), against plaintiffs Jimmie Belgard and Trudie Belgard (the "Belgards"). The United States relies on Rule 56 of the Federal Rules of Civil Procedure ("FRCP") for relief.

Plaintiffs filed an opposition to this motion. For the following reasons, we GRANT this motion.

I. PROCEDURAL AND FACTUAL BACKGROUND

Because the essence of this case implicates certain provisions of the Administrative Procedures Act (the "APA"), we begin with a review of the genesis of the Belgards' APA claim, including the events that triggered this court's authority to review a decision of the USDA.

1. The Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act of 1999

In 1998, the Belgards engaged in aquaculture farming and harvesting of catfish fingerlings in the Parish of Rapides, State of Louisiana.[1] While the catfish fingerling industry has progressed due to improvements in technology, not all fish successfully mature to harvest. That is, a certain percentage of catfish fingerlings will normally perish during an aquaculture growing season. Conversely, other loss offish occur because of natural disasters, such as excessive heat or drought. Financially to assist producers, including catfish producers, who suffered crop losses due to natural disasters in 1998, or in at least three (3) of the four (4) years between 1994 and 1998, Congress passed the Agricultural, Rural Development, Food and Drug Administration, and Related

---

[1] "Aquaculture" is defined as follows: "the reproduction and rearing of aquatic species in controlled or selected environments. . ." 7 C.F.R. § 1477.103 (1999).

Agencies Appropriation Act of 1999, § § 1101 and 1102 (Pub. L. 105-277, 112 Stat. 2681-42 through 2681-44) (the "Act"). Sections 1101 and 1102 of the Act created the Crop Loss Disaster Assistance Program (the "CLDAP"). *See* 7 C.F.R. § 1477 et seq. (1999). Furthermore, Congress designated the USDA as the federal agency charged with the task of administering the provisions of the CLDAP.

Under the CLDAP, Congress authorized financial relief for producers to be appropriate only for losses directly resulting from a natural disaster. *See* 7 C.F.R. § § 1477.104(a), 1477.201(b)(3) (1999). Under the CLDAP, the Secretary of the USDA had the responsibility of formulating a method to calculate disaster payments to eligible catfish fingerling producers. *See* 7 C.F.R. § 1477.101(a) (1999). Recognizing, however, that not all losses are the result of natural disasters, Congress required the USDA to identify and quantify losses due to events or conditions other than disasters, which would be applied equally to all aquaculture farm producers. *See* 7 C.F.R. § 1477.110(e)(2). In order to quantify losses due to occurrences other than natural disasters, the USDA created the following definition term: "Normal mortality." *See* 7 C.F.R. § 1477.103 (1999). Normal mortality is defined as follows: "the percentage of . . . dead aquacultural species that would normally occur during the crop year." 7 C.F.R. § 1477.103 (1999). Also, the CLDAP specified that the provisions of the program "shall be carried out in the field by State and county Farm Serve Agency committees." 7 C.F.R. § 1477.102(a). As a result, the USDA and Louisiana State Office of the Farm Service Agency (the "FSA") began the process of formulating a normal mortality rate for the State of Louisiana's (the "State") catfish fingerling industry.

Robert Bradley, an FSA program specialist, proved instrumental in arriving at the baseline, normal mortality rate. Namely, Bradley assisted in the preparation of a document that established the normal mortality rate: the Louisiana Disaster Assistance Program DAP-20 ("DAP-20). In formulating the normal mortality rate, Bradley sought and received assistance from the following agencies: (1) the Louisiana State University Agricultural Center ("LSU"); (2) County Executive Directors of the FSA; and (3) catfish producers in the State. Specifically, between January and March 1999, Bradley conferred numerous times with Dr. C. Greg Lutz ("Lutz"), an aquaculture specialist at LSU. Lutz admits that, although he did not specifically recommend applying a normal mortality rate of 20%, he "provided the figure of 20% mortality as a typical rate for the Louisiana [catfish fingerling] industry during the 1998 time frame covered by the [CLDAP]"to Bradley. In addition to relying on Lutz's expert opinion, Bradley interviewed numerous catfish producers, they confirmed that a normal mortality factor of 20% to be consistent with their experience in the catfish fingerling industry. Finally, Bradley considered technical reports on the subject of the aquaculture, catfish fingerling industry when arriving at the recommendation to employ a normal mortality rate of 20%. As a result, on 26 March 1999, the USDA, with the assistance of and through the FSA, adopted and included in Louisiana Disaster Assistance Program Notice-20 ("DAP 20") a normal mortality factor of 20% for the State's catfish fingerling industry. The normal mortality factor of 20% meant that when a catfish producer applied for financial assistance under the CLDAP, the USDA would apply a 20% normal mortality factor to any disaster assistance awarded an applicant under the CLDAP.

B. The Belgards Application for Disaster Assistance Under the CLDAP

As previously stated, in 1998, the Belgards owned and farmed six (6), aquaculture, catfish fingerling ponds. During the summer months of 1998, the Belgards contend that they suffered severe losses, amounting to 59.87% of their catfish fingerlings, due to disaster; namely, extremely hot weather. As a result, on or about 8 April 1999, the Belgards applied to the FSA County Committee (the "CC") for financial assistance pursuant to the CLDAP. On 23 June 1999, the CC authorized payment to the Belgards in the amount of $ 44,255.82. The CC, however, did not compensate the Belgards for the loss of the entire crop, but instead applied the 20% normal mortality factor to the loss calculation, which resulted in the plaintiff's receiving less financial assistance than plaintiffs deemed appropriate.

Unsatisfied with the amount of disaster assistance awarded, the Belgards initiated the process of appealing the amount of the relief granted by the CC. Specifically, the Belgards appealed the CC's use and the USDA's adoption of the 20% normal mortality factor when calculating the monetary amount of the Belgard's disaster relief. On 12 July 1999, plaintiffs requested the CC to reconsider its application of the 20% normal mortality rate when calculating disaster payment due the Belgards. On 16 September 1999, after reviewing plaintiffs' request, the CC notified the Belgards, in writing, that the use of the 20% normal mortality rate did not constitute an appealable issue. Thereafter, on 5 October 1999, plaintiffs requested the National Appeals Division (the "NAD") of the USDA to review the CC's written decision

that the use of the 20% normal mortality factor did not amount to an appealable issue.

The NAD acknowledged the Belgard's written request on 6 October 1999 and requested that plaintiffs provide a written statement explaining why the CC's decision to use a normal mortality factor of 20% amounted to an appealable issue. In their letter to the NAD, the Belgards proffered two (2) reasons: (1) "an expected yield loss is a normal mortality and value loss crops do not lend themselves to normal mortality loss situations;" and (2) a normal mortality rate should not have been applied to calculate plaintiff's disaster payment because the "[normal mortality rate] is not a statutory or regulatory provision."

Subsequent to receiving the Belgards' written explanation, the NAD submitted the authored exposition to the FSA for study. Thereafter, on 19 October 1999, the FSA studied plaintiff's rationales, but contended that the normal mortality rate constituted a matter of general applicability and, therefore, did not amount to an appealable issue. The FSA then submitted its findings to the NAD. Likewise, in a written decision on 7 December 1999, the NAD determined that usage of the 20% normal mortality rate did not amount to an appealable decision. Additionally, the NAD denied the Belgard's request to reconsider this decision.

On 6 December 2000, pursuant to 5 U.S.C. § 702 of the APA and 7 U.S.C. § 6999, which provides for judicial review of final decisions rendered by the NAD of the USDA, plaintiffs filed a petition for judicial review of the USDA's decision with this court. Additionally, the Belgards alleged the following additional causes of action: (1) USDA agents

Cooper, McCain, and Bradley conspired to destroy plaintiffs' catfish fingerling business; (2) Cooper made false and misleading statements concerning the Belgards; and (3) the USDA reduced the Belgards' disaster benefits without an opportunity to be heard. Afterwards, on 9 September 2001, the United States filed its opposed motion for summary judgment, which this court now addresses.

III. LAW AND ANALYSIS

A. Standard of Review Under FRCP 56

The defendant seeks relief pursuant to Rule 56 of the FRCP. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" when viewed in the light most favorable to the non-moving party, indicate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). A fact is "material" if its existence or nonexistence "might affect the outcome of the suit under governing law." *See Anderson*, 477 U.S. at 248. A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *See Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Stewart v. Murphy*, 174 F.3d 530, 533 (5th Cir. 1999).

In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *See Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513. Once the moving party has initially shown "that there is an absence of

evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986), the non-moving party must come forward, after adequate time for discovery, with "specific facts" showing a genuine factual issue for trial. *See* Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Such evidence should create more than a metaphysical doubt about the material facts or should be more than a theoretical possibility that the claim is good. *See id.; Pennington v. Vistron Corp.*, 876 F.2d 414, 426 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1123 (5th Cir. 1988). The moving party need only point out the absence of evidence supporting the nonmoving party's case, it "need not negate the elements of the nonmovant's case." *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Allegations in the pleadings, naked assertions of factual disputes, and conclusory allegations are not sufficient. *See Solo Serve Corp. v. Westowne Assoc.*, 929 F.2d 160, 165 (5th Cir. 1991); *Herrera v. Millsap*, 862 F.2d 1157, 1160 (5th Cir. 1989); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195-96 (5th Cir. 1996).

While the party opposing the motion may use proof filed by the movant to satisfy his burden, "only evidence - not argument, not facts in the complaint - will satisfy "the burden. *See Solo Serve Corp.* 929 F.2d at 164. "Unsworn pleadings, memoranda or the like are not, of course, competent summary judgment evidence." *See Larry v. White*, 929 F.2d 206, 211 n.12 (5th Cir. 1991, *cert. denied*, 507 U.S. 1051, 113 S. Ct. 1946, 123 L. Ed. 2d 651 (1993). If the adverse party does not so respond, summary judgment, if

appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

In addition to the standard of review required by Rule 56 of the FRCP, we are required to apply a standard of review that is specific to this court's review of administrative agency decisions.

B. Standard of Review under the APA

The standard of review for judicial review of decisions made by administrative agencies is one of great deference and does not include a *de novo* review of the facts. *See Brouillette v. U.S. Dep't of Agric.*, 840 F. Supp. 55, 57 (W.D. La. 1993). Reversal of an agency decision is appropriate only upon a finding that the administrative action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Bank of Commerce v. City Nat'l Bank*, 484 F.2d 284, 289 (5th Cir. 1973), *cert. denied*, 416 U.S. 905, 94 S. Ct. 1609, 40 L. Ed. 2d 109 (1974). A court is not permitted to impose its own construction of a statutory provision for a reasonable interpretation made by the agency. *United States v. Shimer*, 367 U.S. 374, 382-83, 81 S. Ct. 1554, 1560, 6 L. Ed. 2d 908 (1961). It is well established that "judges review administrative action on the basis of the agency's stated rationale and findings." *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 243 U.S. App. D.C. 68, 751 F.2d 1287, 1325 (D.C. Cir. 1984), *cert. denied*, 479 U.S. 923, 107 S. Ct. 330, 93 L. Ed. 2d 302 (1986). The agency must articulate the reasons why it has exercised its discretion in a given manner. *T & S.F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807, 93 S. Ct. 2367, 2374, 37 L. Ed. 2d 350 (1973). A decision is arbitrary or

capricious "only when it is 'so implausible that it could not be ascribed to a difference in view or the product or the product of agency expertise.'" *Wilson v. U.S. Dep't of Agric.*, 991 F.2d 1211, 1215 (5th Cir. 1993). The job of the reviewing court, therefore, is only to determine whether the administrative findings are supported by substantial evidence of the record as a whole. *Bank of Commerce*, 484 F.2d at 289.

In determining whether the agency's construction is reasonable, the court confines its inquiry to the evidence before the agency, that is, the statements in the record of the decision-making process. *Motor Vehicle, Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43-44, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). While the focal point of review is the administrative record, however, the court may rely upon the additional explanations of agency decision-makers obtained through affidavits, where the agency's rationale cannot be fully discerned for effective judicial review. *See Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S. Ct. 1241, 1244, 36 L. Ed. 2d 106 (1973).

Further, when determining if an agency's construction of a regulation is legally permissible, the analysis is governed by the Supreme Court's decision in *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Pursuant to this framework, the reviewing court asks two (2) questions. *See id.* at 842, 104 S. Ct. at 2781-82. First, "is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Id. at 842-43, 104 S. Ct. at 2781-82. If the first question is answered in the negative, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2781-82. Moreover, "if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843-44, 104 S. Ct. at 2782-83. The agency's interpretation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. at 2778. Furthermore, the interpretation should be upheld if reasonable, and it is not necessary that the agency's interpretation be the sole interpretation or one that the court would reach if it were considering the matter initially. *Enron Oil and Gas Co. v. Lujan*, 978 F.2d 212, 215 (5th Cir. 1992) (citation omitted), *cert. denied*, 510 U.S. 813, 114 S. Ct. 59, 126 L. Ed. 2d 29 (1993).

1. The Belgard's Claim That the USDA Acted Arbitrarily or Capriciously in Adopting a 20% Normal Mortality Factor Under the APA

Plaintiffs argue that the USDA's decision to employ 20% as the normal mortality rate of catfish fingerlings in the formulation of disaster assistance under the CLDAP is arbitrary and capricious, without substantial support in the record. Conversely, the United States responds that the USDA arrived at the 20% figure in a rational, methodical manner, which is substantially supported in the record. For the reasons that follow, we agree with the United States.

First, the CLDAP specifically provided for the USDA to make financial assistance available for losses directly related to disasters only; that is, payment made for losses due to causes other than a disaster would exceed the express authority granted under both the Act and federal regulations. *See* Section 1102(a) of the Act; 7 C.F.R. § § 1477.104(a), 1477.201(b)(3). Persons administering the disaster relief program are prohibited from paying benefits for losses resulting from any cause other than a disaster. *See* 7 C.F.R. § 1477.102(b). Second, the CLDAP expressly recognized that a percentage of catfish fingerlings will not survive to harvest under normal, non-disaster conditions. *See* 7 C.F.R. § § 1477.110(e)(2), 1477.103. And third, although the federal regulations are silent in terms of normal mortality as a precise percentage, the statute has left a "gap for the agency to fill." *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2781-82. As stated earlier, under Chevron, when a statute is silent or ambiguous with respect to a specific issue, the court asks whether the agency's answer or determination is based on a permissible construction of the statute. *See id.* We find adequate support in the record that the USDA arrived at the 20% normal mortality rate in a reasoned fashion.

The evidence suggests that Bradley sought guidance from a number of sources when formulating the 20% figure. For example, plaintiffs admit that Lutz, while not specifically recommending the agency to employ 20% as a normal mortality rate, did advise Bradley that a 20% mortality rate was a typical rate of mortality for the Louisiana catfish fingerling industry during thee 1998 aquaculture season, which is within the time period plaintiffs sought disaster assistance. Bradley, however, did not rely solely on Lutz's expert opinion. Instead, the record indicates that Bradley

considered a great deal of other information, including the practices of numerous catfish producers in the State, each of whom confirmed that a 20% normal mortality rate was reasonable. Bradley also researched other relevant, technical reports. Even if this court could reach a different conclusion than Bradley reached, the test of an arbitrary and capricious decision is whether the conclusion can be attributed to a plausible point of view or agency expertise based on the information considered. *See Wilson*, 991 F.2d at 1215. In the instant case, the record demonstrates that the USDA's decision to employ a 20% normal mortality factor when formulating disaster assistance under the CLDAP is plausible and is the result of germane information that the USDA considered.

Additionally, the record demonstrates that the Belgards took advantage of the opportunity to appeal the County Committee's decision. The record pertaining to the local and state committee appeals, including the NAD, discloses that the committees not only listened to plaintiff, but also required the agency to justify its position and rationale in formulating the 20% normal mortality factor. Based on all the information they received, the local and state committees and the National Appeals Division all concluded that the USDA's use of a 20% normal mortality factor constituted a non-appealable issue. Our review of this determination reveals that ample evidence exists in the administrative record to support the finding that the agency arrived at the 20% normal mortality factor in a reasoned manner. Therefore, we find that the USDA's decision to employ a 20% normal mortality factor for catfish fingerlings in the 1998 season not to be so "implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Gibson v. United States*, 11 Cl. Ct. 6,

15 (1986) (*quoting Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S. Ct. at 2866). In sum we are not persuaded that the USDA acted arbitrarily or capriciously when formulating and applying the 20% normal mortality factor. Accordingly, we grant defendant's motion for summary judgment with respect to Belgards' claim pursuant to the APA.

2. The Belgards' Claims Against Cooper, McCain, and Bradley

The Belgards' claim that Cooper, McCain, and Bradley (collectively the "Individual Defendants") conspired to destroy plaintiff's aquaculture business. Plaintiffs' claim of conspiracy does not merit extensive discussion. As already stated, Bradley is a program specialist with the FSA. Since 1991, McCain has served as FSA County executive director for Rapides Parish, and Cooper is the executive director of the FSA. Plainly, under *28 U.S.C.* § *2679*(b)(1), federal employees acting within the course and scope of employment, whether in a discretionary or operational role, are afforded absolute tort immunity. *Perry v. United States of America*, 936 F. Supp. 867, 872 (S.D. Ala. 1996) (citations omitted).

Under Section 1102(a) of the Act, Congress authorized the Secretary of the USDA to pay benefits to farmers for losses suffered as the result of disaster. *See also*, 7 C.F.R. § 1477.101. The Act afforded the USDA with wide discretion to "fill in the gaps" in order to define the parameters for attributing a loss to a disaster. The record indicates that the Individual Defendants acted within the scope of their employment in defining the parameters of the Act, including the formulation of the 20% normal mortality factor for catfish fingerlings. Cooper, McCain, and Bradley participated in the

adoption of the 20% normal mortality rate and the application of same. As a result, this court finds it palpably pellucid that all the Individual Defendants acted within the scope of employment. The Individual Defendants, therefore, are shielded from the claim of conspiracy alleged by the Belgards.

The claim by the Belgards against Cooper for alleged false and misleading statements is likewise barred under 28 U.S.C. § 2679(b)(1). Cooper's alleged statements emanated through his position as a State executive director of FSA; therefore, Cooper uttered the statements within the course and scope of his employment.

Finally, Belgards also allege that the Individual Defendants reduced plaintiffs' benefits by applying the 20% normal mortality factor without notice to be heard. As we stated in detail above, the Act authorized the USDA to formulate a normal mortality factor, and the USDA did not act arbitrarily or capriciously during its decision-making process. Furthermore, the 20% mortality rate is an interpretive rule for which no notice or opportunity to be heard is required under the APA. *See* 5 U.S.C. § 553(b)(3)(A). Interpretive rules explain or define particular terms in a statute; they are statements as to what an agency thinks the statute means. *See Davidson v. Glickman*, 169 F.3d 996, 999 (5th Cir. 1999) (quoting *Brown Express Inc., v. United States*, 607 F.2d 695, 700 (5th Cir. 1979)). Furthermore, an interpretive rule is one "issued by an agency to advise the public of the agency's construction of a statute and rules which it administers." *Chrysler corp. v. Brown*, 441 U.S. 281, 302 n. 31, 99 S. Ct. 1705, 1717-18 n. 31, 60 L. Ed. 2d 208 (1979). As required by the CLDAP, USDA

interpreted the meaning of "normal mortality" rate under non-disaster conditions. Therefore, the USDA interpreted the statute, which does not implicate any right or interest of the Belgards subject to notice and hearing requirements. As a result, we grant defendant's motion for summary judgment with regard to plaintiffs' claims against the Individual Defendants.

IV. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment under Federal Rule of Civil Procedure 56 is GRANTED.

Alexandria, Louisiana

17 December 2001

/s/ _____
F. A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
ALEXANDRIA DIVISION

CIVIL ACTION NO. 00-2664
SECTION "A" (JUDGE LITTLE)

[Filed December 17, 2001]

JIMMIE BELGARD, et ux	)
	)
-vs-	)
	)
UNITED STATES DEPARTMENT OF AGRICULTURE, et al.	)
	)

JUDGMENT

For written reasons given this date, defendants' Motion for Summary Judgment is GRANTED. Plaintiffs' case is DISMISSED WITH PREJUDICE.

Alexandria, Louisiana

17 December 2001

/s/ _____
F. A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
ALEXANDRIA DIVISION

CIVIL ACTION NO. 00-2665
SECTION "A" (JUDGE LITTLE)

[Filed December 20, 2001]

BELWISE AQUACULTURE SYSTEMS, INC.	)
-vs-	)
UNITED STATES DEPARTMENT OF AGRICULTURE	)

MEMORANDUM RULING

Before this court is a Motion for Summary Judgment [Doc. No. 16] filed by defendant, United States of America (the "United States") for the United States Department of Agriculture (the "USDA"), against Belwise Aquaculture Systems, Inc. ("Belwise"). The United States relies on Rule 56 of the Federal Rules of Civil Procedure ("FRCP") for relief. Plaintiffs filed an opposition to this motion. For the following reasons, we GRANT this motion.

I. PROCEDURAL AND FACTUAL BACKGROUND

Because the essence of this case implicates certain provisions of the Administrative Procedures Act (the "APA"), we begin with a review of the genesis of Belwise's APA claim, including the events that triggered this court's authority to review a decision of the USDA.

1. The Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act of 1999

In 1998, Belwise engaged in aquaculture farming and harvesting of catfish fingerlings in the Parish of Rapides, State of Louisiana.[1] While the catfish fingerling industry has progressed due to improvements in technology, not all fish successfully mature to harvest. That is, a certain percentage of catfish fingerlings will normally perish during an aquaculture growing season. Conversely, other loss of fish occur because of natural disasters, such as excessive heat or drought. To assist financially producers, including catfish producers, who suffered crop losses due to natural disasters in 1998, or in at least three (3) of the four (4) years between 1994 and 1998, Congress passed the Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act of 1999, § § 1101 and 1102 (Pub. L. 105-277, 112 Stat. 2681-42 through 2681-44) (the "Act"). Sections 1101 and 1102 of the Act created the Crop

---

[1] "Aquaculture" is defined as follows: "the reproduction and rearing of aquatic species in controlled or selected environments. . ." 7 C.F.R. § 1477.103 (1999).

Loss Disaster Assistance Program (the "CLDAP"). *See* 7 C.F.R. § 1477 et seq. (1999). Furthermore, Congress designated the USDA as the federal agency charged with the task of administering the provisions of the CLDAP.

Under the CLDAP, Congress authorized financial relief for producers to be appropriate only for losses directly resulting from a natural disaster. *See* 7 C.F.R. § § 1477.104(a), 1477.201(b)(3) (1999). Under the CLDAP, the Secretary of the USDA had the responsibility of formulating a method to calculate disaster payments to eligible catfish fingerling producers. *See* 7 C.F.R. § 1477.101(a) (1999). Recognizing, however, that not all losses are the result of natural disasters, Congress required the USDA to identify and quantify losses due to events or conditions other than disasters, which would be applied equally to all aquaculture farm producers. *See* 7 C.F.R. § 1477.110(e)(2). In order to quantify losses due to occurrences other than natural disasters, the USDA created the following definition term: "Normal mortality." *See* 7 C.F.R. § 1477.103 (1999). Normal mortality is defined as follows: "the percentage of . . . dead aquacultural species that would normally occur during the crop year." 7 C.F.R. § 1477.103 (1999). Also, the CLDAP specified that the provisions of the program "shall be carried out in the field by State and county Farm Serve Agency committees." 7 C.F.R. § 1477.102(a). As a result, the USDA and Louisiana State Office of the Farm Service Agency (the "FSA") began the process of formulating a normal mortality rate for the State of Louisiana's (the "State") catfish fingerling industry.

Robert Bradley, an FSA program specialist, proved instrumental in arriving at the baseline, normal mortality rate.

Namely, Bradley assisted in the preparation of a document that established the normal mortality rate: the Louisiana Disaster Assistance Program DAP-20 ("DAP-20). In formulating the normal mortality rate, Bradley sought and received assistance from the following agencies: (1) the Louisiana State University Agricultural Center ("LSU"); (2) County Executive Directors of the FSA; and (3) catfish producers in the State. Specifically, between January and March 1999, Bradley conferred numerous times with Dr. C. Greg Lutz ("Lutz"), an aquaculture specialist at LSU. Lutz admits that, although he did not specifically recommend applying a normal mortality rate of 20%, Lutz "provided the figure of 20% mortality as a typical rate for the Louisiana [catfish fingerling] industry during the 1998 time frame covered by the [CLDAP]"to Bradley. In addition to relying on Lutz's expert opinion, Bradley interviewed numerous catfish producers, who confirmed that a normal mortality factor of 20% to be consistent with their experience in the catfish fingerling industry. Finally, Bradley considered technical reports on the subject of the aquaculture, catfish fingerling industry when arriving at the recommendation to employ a normal mortality rate of 20%.

Likewise, the USDA conducted extensive research when developing a maximum loss level pursuant to § 1477.110(e). Program specialists at the USDA referenced a number of technical reports related to maximum losses suffered by catfish fingerling producers in the State during previous years and the 1998 catfish fingerling growing seasons. Further, USDA program specialists contacted numerous catfish fingerling producers in the State, who submitted relevant information concerning maximum losses of catfish fingerlings to the agency during the time period Belwise alleged financial

losses. The USDA then considered the information provided by the catfish fingerling producers when formulating the maximum loss rate.

As a result, on 26 March 1999, the USDA, with the assistance of and through the FSA, adopted and included in Louisiana Disaster Assistance Program Notice-20 ("DAP 20") a normal mortality factor of 20% for the State's catfish fingerling industry. The normal mortality factor of 20% meant that when a catfish producer applied for financial assistance under the CLDAP, the USDA would apply a 20% normal mortality factor to any disaster assistance awarded an applicant under the CLDAP. Similarly, on 15 June 1999, the Parish of Rapides County Committee of the FSA adopted a maximum loss level of 60% of catfish fingerlings for applicants applying for assistance under the CLDAP. The 60% maximum loss level meant the USDA would apply a 60% maximum loss level to any disaster assistance awarded an applicant under the CLDAP.

B. <u>The Belwise Application for Disaster Assistance Under the CLDAP</u>

As previously stated, in 1998, Belwise owned and fanned eight (8), aquaculture, catfish fingerling ponds. During the summer months of 1998, Belwise contends that they suffered severe losses, amounting to 80.39% of their catfish fingerlings, due to disaster; namely, extremely hot weather. As a result, on or about 8 April 1999, Belwise applied to the FSA County Committee (the "CC") for financial assistance pursuant to the CLDAP. On 23 June 1999, the CC authorized payment to Belwise in the amount of $29,045. The CC, however, did not compensate Belwise for the loss of the entire

crop, but instead applied the 20% normal mortality factor and 60% maximum loss rate to the loss calculation, which resulted in the plaintiffs receiving less financial assistance than plaintiff deemed appropriate.

Unsatisfied with the amount of disaster assistance awarded, Belwise initiated the process of appealing the amount of the relief granted by the CC. Specifically, Belwise appealed the USDA's adoption of and CC's use of the 20% normal mortality factor and 60% maximum loss level when calculating the monetary amount of Belwise's disaster relief. On 12 July 1999, plaintiff requested the CC to reconsider its application of the 20% normal mortality rate and 60% maximum loss factor when calculating disaster payment due Belwise. On 9 September 1999, after reviewing plaintiff's request, the CC notified Belwise, in writing, that the use of the 20% normal mortality rate and 60% maximum loss level did not constitute appealable issues. Thereafter, on 5 October 1999, plaintiff requested the National Appeals Division (the "NAD") of the USDA to review the CC's written decision that the use of the 20% normal mortality and 60% maximum loss rates did not amount to appealable issues.

The NAD acknowledged Belwise's written request on 6 October 1999 and requested that plaintiff provide a written statement explaining why the CC's decision to use a normal mortality factor of 20% and 60% maximum loss rate amounted to appealable issues. In their letter to the NAD, Belwise proffered that a normal mortality rate of 20% and a 60% maximum loss factor should not have been applied to calculate plaintiff's disaster payment because neither the normal mortality raze nor maximum loss factor is a statutory or regulatory provision.

Subsequent to receiving Belwise's written explanation, the NAD submitted the authored exposition to the FSA for study. Thereafter, on 19 October 1999, the FSA studied plaintiffs rationales, but contended that both the normal mortally/and maximum loss razes constituted matters of general applicability and, therefore, did not amount to appealable issues. The FSA then submitted its findings to the NAD. Likewise, in a written decision on 7 December 1999, the NAD determined that the usage of the 20% normal mortality and 60% max/mum loss rates did nor amount to appealable decisions. Additionally, the NAD denied Belwise's request to reconsider this decision.

On 6 December 2000, pursuant to 5 U.S.C. § 702 of the APA and 7 U.S.C. § 6999, which provides for judicial review of final decisions rendered by the NAD of the USDA, plaintiff filed a petition for judicial review of the USDA's decision with this court. Afterwards, on 9 September 2001, the United States filed its opposed motion for summary judgment, which this court now addresses.

II. LAW AND ANALYSIS

A. Standard of Review Under FRCP 56

The defendant seeks relief pursuant to Rule 56 of the FRCP. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" when viewed in the light most favorable to the non-moving party, indicate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Cir. P. 56(c); *Anderson v. Liberty Lobby Inc.*,

477 U.S. 242, 249-50, 106 S. Ct. 2505, 2509-10 (1986). A fact is "material" if its existence or nonexistence "might affect the outcome of the suit under governing law." *See Anderson*, 477 U.S. at 248. A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *See Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Stewart v, Murphy*, 174 F.3d 530, 533 (5th Cir. 1999).

In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *See Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513. Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986), the non-moving party must come forward, after adequate time for discovery, with "specific facts" showing a genuine factual issue for trial. *See* Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348 (1986). Such evidence should create more than a metaphysical doubt about the material facts or should be more than a theoretical possibility that the claim is good. *See id.*; *Pennington v. Vistron Corp.*, 876 F.2d 414, 426 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1123 (5th Cir. 1988). The moving party need only point out the absence of evidence supporting the nonmoving party's case, it "need not negate the elements of the nonmovant's case." *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Allegations in the pleadings, naked assertions of factual disputes, and conclusory allegations are not sufficient. *See Solo Serve Corp. v. Westowne Assoc.*, 929 F.2d 160, 165 (5th Cir. 1991); *Herrera v. Millsap*, 862 F.2d 1157, 1160 (5th Cir. 1989);

Fontenot v. Upjohn Co., 780 F.2d 1190, 1195-96 (5th Cir. 1996).

While the party opposing the motion may use proof filed by the movant to satisfy his burden, "only evidence - not argument, not facts in the complaint - will satisfy "the burden. *See Solo Serve Corp.* 929 F.2d at 164. "Unsworn pleadings, memoranda or the like are not, of course, competent summary judgment evidence." *See Larry v. White*, 929 F.2d 206, 211 n.12 (5th Cir. 1991, *cert. denied*, 507 U.S. 1051, 113 S. Ct. 1946, 123 L. Ed. 2d 651 (1993). If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

In addition to the standard of review required by Rule 56 of the FRCP, we are required to apply a standard of review that is specific to this court's review of administrative agency decisions.

B. Standard of Review under the APA

The standard of review for judicial review of decisions made by administrative agencies is one of great deference and does not include a *de novo* review of the facts. *See Brouillette v. U.S. Dep't of Agric.*, 840 F. Supp. 55, 57 (W.D. La. 1993). Reversal of an agency decision is appropriate only upon a finding that the administrative action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Bank of Commerce v. City Nat'l Bank*, 484 F.2d 284, 289 (5th Cir. 1973), *cert. denied*, 416 U.S. 905, 94 S. Ct. 1609, 40 L. Ed. 2d 109 (1974). A court is not permitted to impose its own construction of a statutory

provision for a reasonable interpretation made by the agency. *United States v. Shimer*, 367 U.S. 374, 382-83, 81 S. Ct. 1554, 1560, 6 L. Ed. 2d 908 (1961). It is well established that "judges review administrative action on the basis of the agency's stated rationale and findings." *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1325 (D.C. cir. 1984), *cert. denied*, 479 U.S. 923, 107 S. Ct. 330, 93 L. Ed. 2d 302 (1986). The agency must articulate the reasons why it has exercised its discretion in a given manner. *T & S.F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807, 93 S. Ct. 2367, 2374, 37 L. Ed. 2d 350 (1973). A decision is arbitrary or capricious "only when it is 'so implausible that it could not be ascribed to a difference in view or the product or the product of agency expertise.'" *Wilson v. U.S. Dep't of Agric.*, 991 F.2d 1211, 1215 (5th Cir. 1993). The job of the reviewing court, therefore, is only to determine whether the administrative findings are supported by substantial evidence of the record as a whole. *Bank of Commerce*, 484 F.2d at 289.

In determining whether the agency's construction is reasonable, the court confines its inquiry to the evidence before the agency, that is, the statements in the record of the decision-making process. *Motor Vehicle, Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43-44, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). While the focal point of review is the administrative record, however, the court may rely upon the additional explanations of agency decision-makers obtained through affidavits, where the agency's rationale cannot be fully discerned for effective judicial review. *See Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S. Ct. 1241, 1244, 36 L. Ed. 2d 106 (1973).

Further, when determining if an agency's construction of a regulation is legally permissible, the analysis is governed by the Supreme Court's decision in *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Pursuant to this framework, the reviewing court asks two (2) questions. *See id.* at 842, 104 S. Ct. at 2781-82. First, "is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S. Ct. at 2781-82. If the first question is answered in the negative, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2781-82. Moreover, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843-44, 104 S. Ct. at 2782-83. The agency's interpretation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. at 2778. Furthermore, the interpretation should be upheld if reasonable, and it is not necessary that the agency's interpretation be the sole interpretation or one that the court would reach if it were considering the matter initially. *Enron Oil and Gas Co. v. Lujan*, 978 F.2d 212, 215 (5th Cir. 1992) (citation omitted), *cert. denied*, 510 U.S. 813, 114 S. Ct. 59, 126 L. Ed. 2d 29 (1993).

1. Belwise's Claim That the USDA Acted Arbitrarily or Capriciously in Adopting a 20% Normal Mortality Factor Under the APA

Plaintiffs argue that the USDA's decision to employ 20% as the normal mortality rate of catfish fingerlings in the formulation of disaster assistance under the CLDAP is arbitrary and capricious, without substantial support in the record. Conversely, the United States responds that the USDA arrived at both rates in a rational, methodical manner, which is substantially supported in the record. For the reasons that follow, we agree with the United States.

First, the CLDAP specifically provided for the USDA to make financial assistance available for losses directly related to disasters only; that is, payment made for losses due to causes other than a disaster would exceed the express authority granted under both the Act and federal regulations. *See* Section 1102(a) of the Act; 7 C.F.R. § § 1477.104(a), 1477.201(b)(3). Persons administering the disaster relief program are prohibited from paying benefits for losses resulting from any cause other than a disaster. *See* 7 C.F.R. § 1477.102(b). Second, the CLDAP expressly recognized that a percentage of catfish fingerlings will not survive to harvest under normal, non-disaster conditions. *See* 7 C.F.R. § § 1477.110(e)(2), 1477.103. Third, the CLDAP specifically mandates that the USDA"shall" establish a maximum loss level for conditions or circumstances other than a natural disaster. *See* 7 C.F.R. § 1477.110(e)(2). And fourth, although the federal regulations are silent in terms of normal mortality and maximum loss level as a precise percentage, the statute has left a "gap for the agency to fill." *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2781-82. As stated

earlier, under Chevron, when a statute is silent or ambiguous with respect to a specific issue, the court asks whether the agency's answer or determination is based on a permissible construction of the statute. *See id.* We find adequate support in the record that the USDA arrived at the 20% normal mortality rate in a reasoned fashion.

The evidence suggests that Bradley sought guidance from a number of sources when formulating the 20% figure. For example, plaintiffs admit that Lutz, while not specifically recommending the agency to employ 20% as a normal mortality rate, did advise Bradley that a 20% mortality rate was a typical rate of mortality for the Louisiana catfish fingerling industry during the 1998 aquaculture season, which is within the time period plaintiff sought disaster assistance. Bradley, however, did not rely solely on Lutz's expert opinion. Instead, the record indicates that Bradley considered a great deal of other information, including the practices of numerous catfish producers in the State, all of whom confirmed that a 20% normal mortality rate was reasonable. Bradley also researched other relevant, technical reports. Even if this court could reach a different conclusion than reached by Bradley, the test of an arbitrary and capricious decision is whether the conclusion can be attributed to a plausible point of view or agency expertise based on the information considered. *See Wilson*, 991 F.2d at 1215. In the instant case, the record demonstrates that the USDA's decision to employ a 20% normal mortality factor when formulating disaster assistance under the CLDAP is plausible and is the result of germane information that the USDA considered.

Similarly, the USDA filled the gaps of § 1477.110(e) in a reasoned manner. Specifically, USDA program specialists contacted numerous catfish fingerling producers in the State, each of whom submitted relevant information concerning maximum losses of catfish fingerlings during previous and 1998 catfish fingerling growing seasons to the agency. Likewise, program specialists at the USDA referenced and studied a number of technical reports related to maximum losses suffered by catfish fingerling producers in the State during the time period Belwise alleges losses. The USDA then considered the information provided by the catfish fingerling producers and technical reports when formulating the maximum loss rate.

Plaintiff argues that the USDA is required to examine and apply all three prongs of § 1477.110(e) in a conjunctive fashion. Plaintiff, however, undermines this reasoning by specifically acknowledging that § 1477.110(e) includes the disjunctive "or" in the language of the statute. *See* 7 C.F.R. § 1477.110(e). In short, when any one of the prongs of § 1477.110(e) is triggered, the maximum loss rate applies.

Additionally, the record demonstrates that Belwise took advantage of the opportunity to appeal the County Committee's decision. The record pertaining to the local and state committee appeals, including the NAD, discloses that the committees not only listened to plaintiff, but required the agency to justify its position and rationale in formulating the 20% normal mortality factor and 60% maximum loss level. Based on all the information they received, the local and state committees and the National Appeals Division all concluded that the USDA's formulation and use of both factors constituted non-appealable issues. Our review of this

determination reveals that ample evidence exists in the administrative record to support the finding that the agency arrived at the 20% normal mortality factor and 60% maximum loss rate in a reasoned manner. Therefore, we find that the USDA's decision to employ a 20% normal mortality factor and 60% maximum loss level for catfish fingerlings in the 1998 season not to be so "implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Gibson v. United States*, 11 C1.Ct. 6, 15 (1986) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. at 2866). In sum we are not persuaded that the USDA acted arbitrarily or capriciously when formulating and applying the 20% normal mortality factor and 60% maximum loss rate. Accordingly, we grant defendant's motion for summary judgment with respect to Belwise's claim pursuant to the APA.

III. CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment under Federal Rule of Civil Procedure 56 is GRANTED.

Alexandria, Louisiana

20 December 2001

/s/ _____
F. A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
ALEXANDRIA DIVISION

CIVIL ACTION NO. 00-2665
SECTION "A" (JUDGE LITTLE)

[Filed December 20, 2001]

BELWISE AQUACULTURE SYSTEMS, INC.	)
-vs-	)
UNITED STATES DEPARTMENT OF AGRICULTURE	)

JUDGMENT

For written reasons given this date, defendants' Motion for Summary Judgment is GRANTED. Plaintiffs' case is DISMISSED WITH PREJUDICE.

Alexandria, Louisiana

20 December 2001

/s/ _____
F. A. LITTLE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E

UNITED STATES DEPARTMENT OF AGRICULTURE
Farm Service Agency
Washington, DC 20250

Disaster Assistance Programs 1-DAP

Amendment 1

Approved by: Acting Deputy Administrator, Farm Programs

/s/ _____
Diane Sharp

Amendment Transmittal

A Reason for Issuance	This handbook has been issued to provide procedure for short-term disaster programs implemented by DAFP, through PECD. Each program's policy and procedure is in a separate part. General procedure is in Part 1. This handbook will improve program delivery by eliminating the use of multiple notices as the directive for short-term ad hoc programs.

2 Authorities

A Legislative History

The sources of authority for the disaster programs in this handbook are the following:

- 1997 Emergency Supplemental Appropriations Act
- Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1998
- Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998
- 1998 Emergency Supplemental Appropriations Act
- Commodity Credit Corporation Charter Act, as amended
- Agricultural Act of 1970(7 U.S.C. 1427a).

B STC Authority to Supplement This Handbook

Do not withdraw any procedure in this handbook.

This handbook may be supplemented with STC policies that have received DAFP authorization. See 1-AS for proper supplementation procedures.

APPENDIX F

Section 5 Special Provision Crops

Par. 1031

-1031 Calculating Losses and Payments for Value Loss Crops-

A
Types of Value
Loss Crops Because of the unique nature of some crops for which disaster assistance is available, special provisions are required to assess losses and calculate assistance. This is necessary because the crops do not lend themselves to yield calculations or production loss situations. Some of these crops, include, but are not limited to:

- ornamental nursery
- Christmas trees
- aquaculture, including ornamental fish
- ginseng root.

Note: Ginseng seed will be handled as a yield based crop.

The procedure in this section is consistent, with procedure contained in 1-NAP, except for the loss threshold.

B
Calculating
Losses for Value
Loss Crops

Disaster assistance for value loss crops is calculated based on the loss of value at the time of disaster. Determinations concerning the value of the loss for the unit must be made.

Example: A value loss crop suffers damage because of a-hurricane. To determine whether the unit suffered an eligible loss at the time of disaster, determine the total value of inventory present on the unit immediately before and after the disaster.

It is important that a loss of value of any portion of the inventory be determined only if that portion of the inventory is not marketable in any market, now and in the future, established for this inventory because of disaster.

C
Quality Loss
Adjustments

Quality loss adjustments do not apply to value loss crops.

*-D -
Calculating
Payments

County Offices shall use a manual CCC-545 according to subparagraph E for calculating CLDAP payments until automated software is received.-*

APPENDIX G

Par. 1032 Aquaculture

A Eligible Aquacultural Species

Eligible aquacultural species are:

- any species of aquatic organisms grown as food for human consumption
- fish raised as feed for fish that are consumed by humans
- ornamental fish propagated and reared in an aquatic medium.

Note: These include, but are not limited to, lobsters, crabs, prawns, shrimp, oysters, clams, finfish used as food for either humans or other eligible aquacultural species, and assorted ornamental fish.

To be eligible for disaster assistance, eligible aquacultural species must be raised:

- by a commercial operator on private property
- in water in a controlled environment.

B
Crop Year — The crop year for all aquacultural species is from October 1 through September 30.

C
Private Property

For a producer to be considered eligible for disaster assistance on aquaculture, COC must determine the:

- producer owns or has leased property with readily identifiable boundaries
- owner or lessee:
- has total control of the waterbed, the ground under the specific type of water
- does not have control, over only a column of water.

D
Controlled
Environment — Eligible aquacultural species must be:

- placed in the aquacultural facility by the producer and must not be growing naturally in the facility

Note: Species indigenous to the facility are not eligible.

- planted or seeded on property described in subparagraph C

- planted or seeded in containers, wire baskets, net pens, or similar device designed for the protection and containment of the seeded aquacultural species.

All portions of the aquatic environment must be under the control of the producer. Control means the operator of the facility implements the following practices.

- Flood prevention, including, but not limited to:

    - placing the aquacultural facility in an area not prone to flood

    - in the case of raceways, devices or structures designed for the structures designed for the control of water level.

- Growing media, providing an aquatic medium that:

    - provides nutrients necessary for the production of the aquacultural species

    - protects the aquacultural species from harmful species or chemicals.

- Fertilization or feeding to obtain expected production results. Evidence of this practice must be provided by the producer at the request of COC. COC must be satisfied that the producer has an adequate supply of vitamins, minerals, or chemicals designed for the control of water quality and application equipment.

D
Controlled
Environment
(Continued)

Irrigation and water quality. Drought shall not be a major peril as all aquacultural operators shall have systems and practices in place to ensure that the aquacultural species have adequate, quality water or aquatic medium. This includes having equipment designed to control the chemical balance and oxygenation of water. Therefore, COC shall consider the following;

- whether the source of water is adequate, to ensure continued growth and survival of the aquacultural species even in the event, of severe drought

- whether the aquacultural facility sustained losses in previous years because of water shortages or water supply interruption, If so, list

corrective actions that have been taken.

- **Predator control**. Losses of aquacultural species because of pressure from other aquatic or nonaquatic species or man should not be a major factor, if the following good aquacultural practices are followed:

  - the aquacultural species are not placed in an area prone to suffer loss from predators

  - the aquacultural species are placed in an environment designed to prevent loss from predators

  - the operator of the aquacultural facility has control over the property on which the aquacultural species are located by way of land ownership or lease

  - the operator of the aquacultural facility is free to conduct aquacultural operations without interference from persons with no interest in the operation.

- **Disease Control.** Disease is not a recognizable cause of loss, unless

disease in the aquacultural species can be tied to damaging weather or other adverse natural occurrence. The operator of the aquacultural facility should have implemented an effective disease control program.

E
Eligible
Operation
Determination

If CCC.540A is filed, the producer Shall provide records COC requires to determine whether the aquacultural species are produced in an eligible facility. Required records include, but are not limited to:

- a report of crop acreage on which the facility resides
- feeding and fertilization
- reproduction
- hatchery operation
- production, inventory, or both
- predator control
- leases
- water quality

- stocking
- onsite specialized equipment
- production site preparation

F
Ineligible
Disaster
Conditions

The loss of eligible aquacultural species must be a **direct** result of natural disaster. Losses because of managerial decisions or losses of aquacultural species normally incurred in the production cycle of the aquacultural species, that is, normal death losses, are not eligible. Other ineligible causes of losses include:

- brownout
- failure of power supply
- the inability to market aquacultural species as a result of quarantine, boycott, or refusal of a buyer to accept production
- units that are not growing environments completely meeting the requirements of subparagraphs C and D

- collapse or failure of equipment used in the aquacultural facility.

Example: Damaging weather interrupts electrical power service causing an aquacultural facility's aeration equipment to fail. The loss of aquacultural species because of the lack of oxygen because of a failure of the aeration equipment is not eligible because natural disaster did not directly impact the aquacultural species.

FOLD-OUT EXHIBIT

1032 Aquaculture (Continued)

G
Standard Units

STC shall convert aquacultural species or varieties to a standard unit of measure. Apply the following steps for each species or variety or grouping.

Note: All sizes or values of a type or variety of a aquacultural species shall be summarized as 1 crop for unit loss purposes.

Step	Action	Example 1	Example 2	Example 3
1	Determine the applicable unit of measure and the value of each.	1 gallon of : • fingerlings = $15 • 9-inch fish = $30 • 12-inch fish = $45 • 15-inch fish = $60	1 pound of: • fingerlings = $5 • 9-inch fish = $7 • 12-inch fish = $10 • 15-inch fish = $12	one 9-inch fish = $2.50 one 12-inch fish = $4 one 15-inch fish = $5.50
2	Determine the standard unit of measure and notify COC.	STC determined that the standard unit is 1 gallon of fingerlings.	STC determined that the standard unit is 1 pound of fingerlings.	STC determined that the standard unit is inches using the 9-inch fish.
3	Convert each unit of measure to a standard unit by using the ratio of values of each unit of measure.	$15 divided by $15 = 1 unit $30 divided by $15 = 2 units $45 divided by $15 = 3 units $60 divided by $15 = 4 units The producer harvested 100 gallons of fingerlings, 50 gallons of 9-inch fish, 75 gallons of 12-inch fish, and 80 gallons of 15-inch fish. Therefore, the producer has 745 units.	$5 divided by $5 = 1 unit $7 divided by $5 = 1.4 units $10 divided by $5 = 2 units $12 divided by $5 = 2.4 units The producer harvested 2 pounds of fingerlings, 5 pounds of 9-inch fish, 10 pounds of 12-inch fish, and 20 pounds of 15-inch fish. Therefore, the producer has 77 units.	$2.50 divided by $2.50 = 1 unit $4.00 divided by $2.50 = 1.6 units $5.50 divided by $2.50 = 2.2 units The producer harvested ten 9-inch fish, five 12-inch fish and fifteen 15-inch fish. Therefore, the producer has 51 units.

Note: Some common units of measure for aquacultural species include, but are not limited to:

- gallons
- pounds
- inches
- pieces.

Continued on the next page

H
Calculating Eligible Loss

To calculate the loss for aquaculture, County Offices must complete the following calculations according to this table. The results of these calculations will be dataloaded on CCC-540A.

Step	Calculation
1	Determine Field Market Value A. • Add the number of gallons, pounds, or similar sized aquacultural species (included in the crop definition) present immediately before the disaster. • Multiply the number of gallons, pounds, or similar sized aquacultural species by the approved average market price for such gallons, pounds, or similar sized aquacultural species. Add the total dollar value of all gallons, pounds, or similar sized aquacultural species of the crop (i.e. nursery and mature clams). Enter the result in CCC-540A, item 29.
2	Determine the dollar value of inventory after disaster: • Add the number of gallons, pounds, or similar sized aquacultural species (included in the crop definition) present immediately after the disaster. • Multiply the number of gallons, pounds, or similar sized aquacultural species by the approved average market price for such gallons, pounds, or similar sized aquacultural species. Add the total dollar value of all gallons, pounds, or similar sized aquacultural species of the crop (i.e. nursery and mature clams). Enter the result in CCC-540A, item 30.
3	Identify the dollar value of ineligible causes of loss: Determine a dollar value for losses stemming from ineligible causes of loss. Enter the result in CCC-540A, item 31.
4	Determine Field Market Value B: Add CCC-540A, item 30 and 31 and enter the result in CCC-540A, item 32.
5	Determine the dollar loss occurrence: Enter the result of CCC-540A, item 29 minus item 32 and enter in CCC-540A, item 33.

Continued on the next page

I
Applying
Payment Factors

The approved prevented planting payment factor for all aquacultural species is zero.

Unharvested payment factors for each type or variety of aquacultural species shall be established by STC.

The approved-unharvested payment factor shall be applied to all aquacultural losses computed for payment, unless the producer can prove that the unit was harvested at the time of disaster or immediately after disaster. If the producer cannot show with documentary evidence that harvest of the unit, or portion of the unit, was performed at the time of disaster or immediately after the disaster, which is the basis for the application, any loss calculated for payment shall be paid at the unharvested rate. In no case shall COC assume that harvest expenses were incurred at or near the time of disaster.

APPENDIX H

LA NOTICE DAP-49
Notice DAP-53

2 County Office Action (Continued)

C
Appeals

For applications that are currently under appeal, continue to process the appeal and provide appeal rights, according to 1-APP.

It is extremely important that County Offices understand that any manual applications that are under appeal shall be loaded into the automated system with an enrollment date entered. The data entered into the automated system should reflect the information provided by the producer. This allows the application, although not approved, to be uploaded to KCMO to be included in the allocation.

Note: Upload must be initiated by the County Office, according to Notice DAP-49.

D
Issuing
Outstanding
Payments

County Offices shall ensure that all outstanding COC-**approved** 1998 single-year and multi-year payments have been issued by December 3, 1999.

Note: This applies only to those applications that have supporting documentation submitted by November 8, 1999.

E

Reports

Outstanding payments that have not been issued by the December 3, 1999, deadline, must be reported to State Offices by COB, Friday, **December 3, 1999.** This report shall include each producer's:

- entitlement report
- amount paid, if applicable
- amount still outstanding to be paid
- reason for payment, that is, multi-year eligibility or appeal
- payment for multi-year or single-year benefits.

Negative reports are required.

Warning: This report shall be as accurate as possible. The National Office will monitor payments issued. If payments begin to exceed the reported amount, County Offices shall provide justification for the discrepancy.

APPENDIX I

FOLD-OUT EXHIBIT
1998 Crop Loss Disaster Payment Calculation Worksheet

REPRODUCE LOCALLY include form number and date on all reproductions

CCC-645
(02-19-99)

U.S. DEPARTMENT OF AGRICULTURE
Commodity Credit Corporation

1998 CROP LOSS DISASTER PAYMENT CALCULATION WORKSHEET

Value Loss Crops

1. Location State Code	2. Location County Code
22079	Rapides

3. Producer Name and ID Number: Jimmie | Trudie Bolgard

4. Producer Share	5. Unit No.	6. Crop Code	7. Crop Nam
1.0			CATFISH

8. Type Name	9. Payment Level
	.65

Unless otherwise specified, round calculation results to 2 decimal places.	RESUL
10. Field Market Value A	$ 322426
11. Disaster Level - Item 10 *times* 65%.	$ 209577
12. Dollar Value of Inventory After Disaster - *add* the dollar value of all types, varieties, and sizes of the eligible crops.	$ 129384
13. Enter the Dollar Value of Ineligible Causes of Loss (dollar value for losses stemming from ineligible causes of loss).	$ 0
14. Field Market Value B - *add* Item 12 and Item 13. **Note:** *Do not include any salvage value.*	$ 129384
Crop Loss - Item 11 *minus* Item 14.	$ 80193
16. Gross Calculated Dollar Loss - Crop loss *times* Item 4. Round to whole dollars.	$ 80193
17. Approved Unharvested Payment Factor	.93
18. Gross Payment - Item 16 *times* Item 17 *times* Item 9. Round to whole dollars.	$ 48477
19. Salvage Value - dollar amount of any salvage value not counted in Item 14 *times* Item 4. Round to whole dollars.	$ 0
20. Net Payment - Item 18 *minus* Item 19. **Note:** *If the result of Item 18 minus Item 19 is not greater than zero, enter zero. Producer is not eligible for payment.*	$ 48,477

21. REMARKS

BEST AVAILABLE COPY

CCC-540A
(02-03-1999)

1. Producer Name and I.D. Numbe.	2. State and County Code
TRUDY T BELGARD 433-80-1967 S	22-079

NOTICE OF LOSS/PRODUCTION WORKSHEET
1998 CROP LOSS DISASTER ASSISTANCE

3. Unit Number	4. Crop (Pay Type)	5. FSN's associated with Unit
1	CATFISH 001	

PART A - NOTICE OF LOSS

6. Check appropriate block:

__ Insured __ Uninsured _X_ Noninsurable

7. What disaster event caused loss and when did the event occur?		8. Number of trees per unit/ave. age
a. Weather related Cause(s)	b. Date(s)	

9. Check type of loss reported in item 7. (Check any and all that apply)

__ Prevented Planting __ Damaged Crop/Low Yield __ Non-Irrigated __ Irrigated

10. Intended but Prevented Planted Acreage	11. Planted Acreage

PART B - RECORD OF MANAGEMENT FOR THIS CROP

12. Purchased/Delivery/Arranged for:	Yes	No	If "Yes", explain (for prevented planting attach copies)
Seed, Chemical, and Fertilizer			
Land Preparation Measures			

13. What cultivation practices were employed on damaged/low yield crop acreage?

14. What was done with prevented planted or damaged crop acreage?

PART C - APPRAISAL OR REPORT OF PRODUCTION - YIELD BASED CROPS - (Not Applicable)

PART D - VALUE LOSS CROPS

29. Producer Share		.5000
30. Determine Field Market Value A	$	322426.00
31. Determine Dollar Value of Inventory After Disaster	$	129384.00
32. Determine Dollar Value of Ineligible Causes	$	
33. Determine Field Market Value B: Add items 31 and 32; enter the result.	$	129384.00
34. Crop Value Loss: Multiply item 30 by 65% and subtract item 33; enter the result.	$	see attached ~~80190.90~~
35. Determine Salvage Value	$	

PART E - PRODUCER CERTIFICATION

I understand that USDA will be conducting spotchecks for this program and authorize FSA access to any records held by elevators, processors, contractors, etc. or any other agency or organization maintaining records or other substantiating evidence for which I am basing this certification of production.

I certify that all information reported is true and correct and understand that if any information is determined to be in error that the application may be denied and may result in a determination of ineligibility in whole or in part.

36. Producer Signature	Date 4-16-99	
37. CAC or Designee Signature	Date 6/15/99	~~Approved~~ Disapproved

162

CCC-540A
(02-03-1999)

1. Producer Name and I.D. Numbe	2. State and County Code
JIMMIE D BELGARD 433-76-9274 S	22-079

NOTICE OF LOSS/PRODUCTION WORKSHEET
1998 CROP LOSS DISASTER ASSISTANCE

3. Unit Number	4. Crop (Pay Type)	5. FSN's associated with Unit
1	CATFISH 001	

PART A - NOTICE OF LOSS

6. Check appropriate block:
__ Insured __ Uninsured _X_ Noninsurable

7. What disaster event caused loss and when did the event occur?

a. Weather related Cause(s)	b. Date(s)

8. Number of trees per unit/ave. age:

9. Check type of loss reported in item 7. (Check any and all that apply)
__ Prevented Planting __ Damaged Crop/Low Yield __ Non-Irrigated __ Irrigated

10. Intended but Prevented Planted Acreage:

11. Planted Acreage:

PART B - RECORD OF MANAGEMENT FOR THIS CROP

12. Purchased/Delivery/Arranged for:	Yes	No	If "Yes", explain (for prevented planting attach copies)
Seed, Chemical, and Fertilizer			
Land Preparation Measures			

13. What cultivation practices were employed on damaged/low yield crop acreage?

14. What was done with prevented planted or damaged crop acreage?

PART C - APPRAISAL OR REPORT OF PRODUCTION - YIELD BASED CROPS - (Not Applicable)

PART D - VALUE LOSS CROPS

29. Producer Share		.5000
30. Determine Field Market Value A	$	322426.00
31. Determine Dollar Value of Inventory After Disaster	$	129384.00
32. Determine Dollar Value of Ineligible Causes	$	
33. Determine Field Market Value B: Add items 31 and 32; enter the result.	$	129384.00
34. Crop Value Loss: Multiply item 30 by 65% and subtract item 33; enter the result.	$	see attached ~~80192.90~~
35. Determine Salvage Value	$	

PART E - PRODUCER CERTIFICATION

I understand that USDA will be conducting spotchecks for this program and authorize FSA access to any records held by elevators, processors, contractors, etc. or any other agency or organization maintaining records or other substantiating evidence for which I am basing this certification of production.

I certify that all information reported is true and correct and understand that if any information is determined to be in error that the application may be denied and may result in a determination of ineligibility in whole or in part.

36. Producer Signature: Jimmie Belgard — Date: 4-16-99

37. COC or Designee Signature — Date: 6/15/99 — Approved / Disapproved

164

APPENDIX J

FOLD-OUT EXHIBIT
1998 Crop Loss Disaster Payment Calculation Worksheet

Attachment #3

REPRODUCE LOCALLY Include form number and date on all reproductions

CCC-545
(02-19-99)

U.S. DEPARTMENT OF AGRICULTURE
Commodity Credit Corporation

1998 CROP LOSS DISASTER PAYMENT CALCULATION WORKSHEET

Value Loss Crops

1. Location State Code	2. Location County Code
22	079

3. Producer Name and ID Number: Belwisp Aquaculture System, INC. 721293256

4. Producer Share	5. Unit No.	6. Crop Code	7. Crop Nam
1.0			

8. Type Name

9. Payment Level: .65

Unless otherwise specified, round calculation results to 2 decimal places.

	RESUL
10. Field Market Value A	$ 210524
11. Disaster Level - Item 10 *times* 65%.	$ 136841
12. Dollar Value of Inventory After Disaster - *add* the dollar value of all types, varieties, and sizes of the eligible crops.	$ 84210 MAY 105
13. Enter the Dollar Value of Ineligible Causes of Loss (dollar value for losses stemming from ineligible causes of loss).	$ 0
14. Field Market Value B - *add* Item 12 and Item 13. *Note:* *Do not include any salvage value.*	$ 84210
Crop Loss - Item 11 *minus* Item 14.	$ 52631
16. Gross Calculated Dollar Loss - Crop loss *times* Item 4. Round to whole dollars.	$ 52631
17. Approved Unharvested Payment Factor	.93
18. Gross Payment - Item 16 *times* Item 17 *times* Item 9. Round to whole dollars.	$ 31815
19. Salvage Value - dollar amount of any salvage value not counted in Item 14 *times* Item 4. Round to whole dollars.	$ 0
20. Net Payment - Item 18 *minus* Item 19. *Note:* *If the result of Item 18 minus Item 19 is not greater than zero, enter zero. Producer is not eligible for payment.*	$ 31815

21. REMARKS

40% of MKT A assigned as MKT B value based on COC approved max loss of 40% for fry/fingerlings.

CCC-540A
(02-03-1999)

1. Producer Name and I.D. Number	2. State and County Code
BELWISE AQUACULTURE SYSTEM, INC 72-1293256 E	22-079

NOTICE OF LOSS/PRODUCTION WORKSHEET
1998 CROP LOSS DISASTER ASSISTANCE

3. Unit Number	4. Crop (Pay Type)	5. FSN's associated with Unit
1	CATFISH 001	

PART A - NOTICE OF LOSS

6. Check appropriate block:
__ Insured __ Uninsured _X_ Noninsurable

7. What disaster event caused loss and when did the event occur?
a. Weather related Cause(s)
b. Date(s)

8. Number of trees per unit/ave. age

9. Check type of loss reported in item 7. (Check any and all that apply)
__ Prevented Planting __ Damaged Crop/Low Yield __ Non-Irrigated __ Irrigated

10. Intended but Prevented Planted Acreage

11. Planted Acreage

PART B - RECORD OF MANAGEMENT FOR THIS CROP

12. Purchased/Delivery/Arranged for:	Yes	No	If "Yes", explain (for prevented planting attach copies)
Seed, Chemical, and Fertilizer			
Land Preparation Measures			

13. What cultivation practices were employed on damaged/low yield crop acreage?

14. What was done with prevented planted or damaged crop acreage?

PART C - APPRAISAL OR REPORT OF PRODUCTION - YIELD BASED CROPS - (Not Applicable)

PART D - VALUE LOSS CROPS

29. Producer Share		1.0000
30. Determine Field Market Value A	$	210524.00
31. Determine Dollar Value of Inventory After Disaster	$	84210.00
32. Determine Dollar Value of Ineligible Causes	$	
33. Determine Field Market Value B: Add items 31 and 32; enter the result.	$	84210.00
34. Crop Value Loss: Multiply item 30 by 65% and subtract item 33; enter the result.	$	~~52630.60~~ 136840.60
35. Determine Salvage Value	$	

PART E - PRODUCER CERTIFICATION

I understand that USDA will be conducting spotchecks for this program and authorize FSA access to any records held by elevators, processors, contractors, etc. or any other agency or organization maintaining records or other substantiating evidence for which I am basing this certification of production.

I certify that all information reported is true and correct and understand that if any information is determined to be in error that the application may be denied and may result in a determination of ineligibility in whole or in part.

36. Producer Signature: By [signature] President — Date 4-16-99

37. COC or Designee Signature [signature] — Date 6/15/99 — Approved / Disapproved

35